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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 344

THE UNITED STATES OF AMERICA PETITIONER,

vs.

WARREN V. MOORE AND MRS WARREN V. MOORE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 5, 1950.

CERTIORARI GRANTED NOVEMBER 27, 1950.

SUPREME COURT OF THE UNITED STATES

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1 [Caption omitted]

In the District Court of the United States, for the Northern District of Texas, Dallas Division

Civil Action No. 3678

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WARREN V. MOORE, ET UX, MRS. WARREN V. MOORE, 620 NORTH MARSALIS, DALLAS, TEXAS, DEFENDANTS

COMPLAINT—Filed June 29, 1949

1. Jurisdiction is conferred upon the Court by Sections 205, 206(b) and 206(c) of the Housing and Rent Act of 1947, as amended,
2 (50 U. S. C. Appendix 1881-1902, Public Law 31, 81st Congress, 1st Session), hereinafter referred to as the Act.

2. The Defendant, whether one or more, as shown in the style of this case, has demanded and received rent for the use and occupancy of the housing accommodations described in Schedule A, attached hereto and made a part hereof as though fully written herein, which housing accommodations are within the defense-rental area designated in Schedule A.

3. At all times mentioned herein, the housing accommodations set forth in Schedule A were subject to the Act and the Controlled Housing Rent Regulation (14 F. R. 1570), as amended, issued pursuant thereto.

4. During the period(s) set forth and on the occasion(s) stated in Schedule A, the Defendant has demanded, accepted, and received rent from the tenant, whether one or more, in the amount set forth on Schedule A for the housing accommodations therein described.

5. At all times material hereto, the maximum legal rents applicable to the housing accommodations were as set forth in Schedule A.

6. In the judgment of the Housing Expediter, the Defendant has engaged in acts and practices set forth in Schedule A which constitute violations of Sections 204 and 206 of the Act, and in view of the violations herein alleged the Defendant will continue to violate said Act by demanding, accepting, and receiving rents in excess of the maximum legal rent on all housing accommodations owned or operated by the Defendant unless enjoined and restrained by the Court.

3 7. That pursuant to Section 205 of the Housing and Rent Act, as amended, damages of three times the amount of the

overcharges occurring within the year preceding the filing of this cause of action have accrued to the persons from whom the overcharges were demanded, accepted, or received by the Defendant; that thirty days have elapsed since the occurrence of the violations alleged, the tenants herein have not brought suit for recovery of the overcharges, and pursuant to the said Section of said Act, the United States of America now asserts its claim for the said damages.

Wherefore, Plaintiff prays:

1. That Plaintiff have judgment against the Defendant for three times all overcharges made, demanded, collected, accepted, or received within one year preceding the filing of this suit.

2. That the Defendant be ordered and directed to pay to the Treasurer of the United States for and on behalf of all persons entitled thereto, all rents collected or received in excess of the maximum legal rents, or in the alternative, that such be paid to the Treasurer of the United States. That in the event the Court grants restitution to the United States for and on behalf of persons entitled thereto, that portion of the overcharges ordered restored for violations occurring within the one year period immediately preceding the filing of this suit for which the Plaintiff prays treble damages is hereby waived, and may be deducted from the treble damages adjudged to the United States of America.

3. That the Court issue without notice a temporary restraining order, and after due notice to the Defendant, a preliminary
4 injunction, and upon final trial of this cause, a final injunction, restraining the Defendant, Defendant's agents, servants, employees, and all persons acting in concert or participation with any of them, from directly or indirectly soliciting, demanding, accepting, or receiving any rent on all controlled housing accommodations owned, operated, or managed by Defendant in excess of the maximum legal rent, or from otherwise violating the Housing and Rent Act of 1947, as heretofore or hereafter amended or superseded, and the Regulations issued pursuant thereto.

4. For costs of this action and such other relief as the Plaintiff may be entitled.

LOWELL D. GIBBONS,
Attorney, Office of the Housing Expediter.

Office of the Housing Expediter,
Regional Office,
422 Fidelity Building,
Dallas 2, Texas.

SCHEDULE "A" TO COMPLAINT

5 Defense-Rental Area: Dallas, Texas

RENTAL UNIT (Address and Identification)	Tenant's Name	Rented by Tenant		Amount Rent Paid Per Month	Maximum Legal Rent		Overcharges		
		From	To		Amount per Month	How Determined	Per Mo.	Number	Total Overcharges
618 North Marsalis Street Upper North Apartment Dallas, Texas	J. R. Qualls	10- 1-47	2- 1-48	$75.00	$18.00	Registration	$57.00	4	$228.00
618 North Marsalis Street Upper North Apartment Dallas, Texas	J. R. Qualls	2- 1-48	10-31-48	75.00	18.72	Registration plus 4%	56.28	9	506.52
618 North Marsalis Street Upper North Apartment Dallas, Texas	J. R. Qualls	10-31-48	5-31-49	70.00	18.72	Registration plus 4%	51.28	7	358.96
									$1,093.48

Amount of overcharges subject to Restitution	Amount of overcharges subject to Treble Damages	Treble Damages	Double Damages	Single Damages
$1,093.48	$527.80	$1,583.40	$1,055.60	$527.80

6 IN UNITED STATES DISTRICT COURT

ORIGINAL ANSWER—Filed Aug. 4, 1949

To the said Honorable Court:

Now comes Warren V. Moore and wife, Mrs. Warren V. Moore, defendants in the above entitled and numbered cause, and in answer to the allegations in the complaint filed herein, represent to the Court:

1

Defendants deny allegations in Section 4 of the complaint, and that they have collected or received the rent for the dates and in the amounts and from the tenant as stated in Schedule "A" of said complaint.

2

Defendants would further show that the amount of rentals as collected from the tenant, J. R. Qualls as evidenced by his checks which he holds as receipts therefor was the sum of $22.00 per month during such term, that said tenant, J. R. Qualls paid said sum voluntarily and insisted upon paying the same with full knowledge of the fact that the claimed registration of the housing accommodations was at the rate of $18.00 per month, and that the said defendants have tendered and offered to the said J. R. Qualls and to the office of the Housing Expediter said excess payment, and that they are now ready, able and willing to make such refund and should not be held liable for triple damages or any costs of Court herein.

7 Wherefore, said defendants pray that they be discharged without day and recover all costs in this behalf expended.

COX & CUSACK,
By FRANK CUSACK,
Attorney for Said Defendants.

322 W. Jefferson, W-9134,
Dallas, Texas.

A copy of this answer has this 3rd day of August, 1949, been served upon Lowell G. Gibbons, plaintiff's Attorney, whose address is 422 Fidelity Building, Dallas 2, Texas, by mailing a copy thereof by United States Mail, postage paid.

In United States District Court

MOTION TO DISMISS—Filed Aug. 16, 1949

Now comes Warren V. Moore and wife, Mrs. Warren V. Moore, defendants in the above entitled and numbered cause and move the

Court to dismiss the complaint against them herein for the reason that the same fails to state a claim upon which relief can be granted in that:

(a) Said complaint is based upon the provisions of the Housing and Rent Act of 1947 as amended and particularly Section 205 thereof:

(b) That said complaint shows upon its face that all matters involved therein arose under the provisions of said Act and no
8 part thereof arose under the provisions of Price Control Extension Act of 1946 or the Emergency Price Control Act of 1942;

(c) That said petition shows on its face that no part of the provisions of Title One, Housing and Rent Act of 1947 as amended or the Housing and Rent Act of 1949 are applicable thereto, but that said complaint is based wholly and solely upon the provisions of Title Two of said Acts;

(d) That pursuant to the provisions of Sub-Section "3" of Sub-Paragraph "J" of Section 204 of the Housing and Rent Act of 1949, Chapter 42, Public Law 32, the provisions of said Title Two of the Housing Act and Rent Act of 1947 and 1949, had been terminated by the Housing Expediter prior to the filing of this complaint pursuant to a resolution adopted by the governing body of the City of Dallas and approved by the Governor of the State of Texas as provided in said section;

(e) That the termination of said Title had the legal effect of terminating the savings clause in sub-paragraph "F" of said Section 204 and this complaint being based solely upon the provisions of said Title Two of said Act and no matters covered by said Title One are involved, the savings clause therein has no application hereto and all matters involved in said complaint having arisen subsequent to the termination of the Emergency Price Control Act of 1942 as extended, no savings clause therein could operate as a saving to this action.

In the alternative defendants move to dismiss all of that part of said complaint wherein damages, triple or otherwise are sought to be recovered for violations occurring prior to June 30, 1948, for the
9 reason that said complaint fails to state a claim upon which relief can be granted in that the only right of action vested in the United States is that provided in Section 204 of the Housing and Rent Act of 1949 amending Section 205 of the Housing and Rent Act of 1947 and the only permission therein granted to the United States is to institute such action within a one year period subsequent to the alleged violation.

Wherefore, premises considered, defendants and each of them, pray that the complaint be dismissed in the alternative that the com-

plaint insofar as it seeks damages for alleged violations occurring prior to June 30, 1948, be dismissed.

COX & CUSACK,
By FRANK CUSACK,
Attorneys for Defendants.

322 W. Jefferson, W-9134,
Dallas, Texas.

A copy of this motion has been served upon the plaintiff by mailing the same to the Honorable Lowell D. Gibbons, Attorney, Office of the Housing Expediter, 422 Fidelity Building, Dallas, Texas.

In United States District Court

ORDER DENYING MOTION TO DISMISS

The above entitled and numbered cause came on to be heard on the motion of the defendants, Warren V. Moore, et ux, Mrs. Warren V. Moore to dismiss the complaint for the reason that it failed to state grounds upon which relief could be granted, and the Court having considered the same, is of the opinion that it should be denied.

It is ordered this 22 day of August, 1949, that said motion be and hereby is denied, to which ruling the defendants except.

WM. H. ATWELL,
United States District Judge.

In the District Court of the United States, for the Northern District of Texas, Dallas Division

Civil Action No. 3678

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

WARREN V. MOORE, ET UX, MRS. WARREN V. MOORE, 620 NORTH MARSALIS, DALLAS, TEXAS, DEFENDANTS

JUDGMENT

On this 17th day of September, 1949 came on for trial the above styled and numbered cause of action. Plaintiff appeared through its attorney, Lowell D. Gibbons and the Defendants appeared through their attorney, Frank Cusack; whereupon the Court proceeded to try the issues involved herein, and from the evidence adduced, finds that the Defendants collected rent in excess of the maximum legal rent, and judgment should be entered requiring the said Defend-

ants to make restitution to J. R. Qualls in the amount of $1,093.48, and that judgment should be entered for and on behalf of the United States for $50.00.

It is therefore Ordered, Adjudged, and Decreed that the Defendants Warren V. Moore and Mrs. Warren V. Moore, be, and they are hereby, ordered to make restitution to J. R. Qualls through the Office of the Housing Expediter, 321 Old Customs House Building, St. Louis, Missouri.

11 It is further Ordered, Adjudged, and Decreed that the Plaintiff have judgment for and recover from the Defendants, Warren V. Moore and Mrs. Warren V. Moore, $50.00; and that the costs of this action be taxed against the Defendant, for which let execution issue.

Entered this 3 day of Oct., A. D., 1949.

WM. H. ATWELL,
United States District Judge.

Approved as to Form:

LOWELL D. GIBBONS,
Attorney for Plaintiff.
FRANK CUSACK,
Attorney for Defendant.

In United States District Court

[Title omitted]

NOTICE OF APPEAL—Filed October 28, 1949

Now comes Warren V. Moore and Mrs. Warren V. Moore, defendants in the above entitled and numbered cause and files this, their notice of appeal to the United States Court of Appeals
12 for the Fifth Circuit from the final judgment rendered herein against them directing restitution to J. R. Qualls in the amount of $1,093.48 and in favor of the United States in the sum of $50.00, together with all costs.

FRANK CUSACK,
of
COX & CUSACK,
Attorney for Defendants.

322 West Jefferson, W-9134,
Dallas, Texas.

In United States District Court

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the Northern District of Texas, Dallas:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Fifth Circuit with reference to the notice of appeal heretofore filed by the defendants in the above cause, transcript of the record in the above cause, prepared and transmitted as required by law and rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) Complaint

(2) Answer

(3) Defendant's Motion to Dismiss Complaint

(4) Order Denying Defendants' Motion to Dismiss Complaint

13 (5) Final Judgment

(6) Notice of Appeal together with the date of filing thereof.

(7) This Designation of Record

(8) The Reporter's transcript of the evidence of the witness, Lowell D. Gibbons as the same appears on Pages 4 to 8 of the Reporter's transcript of the evidence, two copies of which is filed herewith.

(9) The Court's oral opinion, Reporter's transcript Pages 22 to 24.

(10) Points of Appeal.

FRANK CUSACK
of
COX & CUSACK,
Attorney for Appellants.

322 West Jefferson, W-9134,
Dallas, Texas.

In United States District Court

Excerpt from Statement of Evidence

Lowell D. Gibbons, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Mr. Gibbons:

I am Lowell D. Gibbons, attorney for the Office of Housing Expediter, Dallas, Texas, and as such I am custodian of the
14 records pertaining to the property at 614 North Marsalis, Upper North Apartment, Dallas, Texas. I have the file showing the maximum legal rent, which was from October 1, 1947 to February 1, 1948, $18.00.

Mr. Cusack:

We object to his statement and conclusion that it was eighteen dollars, and that the document or the instrument or the method by which that was fixed and determined is the best evidence.

The Court:

That is what he has before him. Overrule the objection. It is a way to get it in, of course, in a hurry; of course, you can look at it. Go ahead, Mr. Gibbons.

Mr. Gibbons:

That from February 1, 1948 until the expiration of the rent control, in Dallas, Texas, the maximum rent was $18.72 per month, the 72 cents being four per cent increase that was granted by the expediter.

Mr. Cusack:

If the Court please, the defendant at this time objects to the testimony as to the maximum rent control and ceiling price on the property as testified to by—

The Court:

All right, you can have your exception. Any cross examination?

Mr. Cusack:

Your Honor, this is very material in this case, and I would like to state my objections, if the Court may permit me.

15 The Court:

Overrule those objections, counsel; you may put it in your bill, if you have an objection.

Mr. Cusack:

The property, Your Honor, is not the property involved in the suit.

The Court:

I said go on, now, with your examination.

Mr. Cusack:

All right.

Cross-examination.

By Mr. Cusack:

Q. Mr. Gibbons, the registration certificate that you have testified from is for 618 North Marsalis, is it not?

A. That is correct.

Q. It does not state what property at 618 North Marsalis is the housing accommodation involved, does it?

A. That is correct, our files reveal there was only one accommodation at that address.

Q. The registration certificate does not identify the property as the upper north apartment at that address, does it?

A. It does not; it does not.

Q. It is not executed by the defendants in this case, is it?

A. It was executed by the former owner, Mrs. S. H. Chiles, C-h-i-l-e-s (spelling), is the way you spell it.

Q. And does not state the number of rooms in the accommodation?

A. No.

16 Q. It is not dated?

A. I haven't checked on that, it is not dated, that is right.

Q. You can't tell from your own knowledge whether it was filed during this time, or prior to this time, or subsequent to this time, can you?

A. The regulations in effect at the time that this was filed there, in November and December of 1942, at the regular filing time, was that they were undated if they were filed during the regular period for filing; if they were filed late, it is dated.

Q. Do you know of your own knowledge, or does your record disclose a filing date of this registration?

A. It does not.

Q. And you don't know of your own knowledge?

A. I do not.

Q. And you can't tell this Court whether or not it was filed before or after the dates involved in this suit, can you, from your own knowledge?

A. No.

Q. Not from your file?
A. No, sir.

Mr. Cusack:
Your Honor, we move to strike the testimony.

The Court:
Overrule your motion.

Mr. Cusack:
Note our exception.

The Court:
Mr. Gibbons, you testified six——

A. Eighteen.

17 The Court:
614—you mean 618, do you?

A. Yes, I have both here, this is the one he handed back.

The Court:
No, I am asking you what you said in your testimony, 614.

A. It should be 618.

The Court:
It should be 618?

A. Yes, sir.

The Court:
That was a lapsus linguae?

A. Yes, sir.

The Court:
All right, call your next witness.

* * * * * * * *

In the United States District Court

COURT'S ORAL OPINION

September 17, 1949

The Court:
The Court is bounden to require the Plaintiff that it make out its case by a preponderance of the testimony. That rule has
18 been satisfied here. Mr. Quarls was the renter. Mr. Moore was the landlord. The dates are all right, as set out and in

appendix, Schedule A to the Plaintiff's petition, and, the records to which Mr. Gibbons referred here, and which he has in his official possession, relate to a property at 618 North Marsalis; that there were more apartments than one there is quite immaterial to the inquiry here.

Mr. Quarls was a tenant in an apartment at 618 Marsalis. He testifies to the manner in which he got in touch with the owner of that apartment who had advertised, not in his own name, but under another name, and, who, when Mr. Quarles called him, made the appointment, and, when he reached the place, he found Mr. Moore, and, the arrangement was made first for $75.00 a month, which was subsequently reduced, by agreement of the parties, and, at the request of the tenant, to $70.00 per month. Each of those amounts were paid by $22.00 checks, and the remainder in cash, both when 75, and when it was 70.

Those facts I find to be facts, established by a preponderance of the testimony.

Now, as to the matter of damages, gentlemen, the total amount of these over-collections is properly alleged, to-wit, $1,093.48.

There is some evidence here of wilfulness, which might justify the Court in imposing double or treble damages, in accordance with the provisions of the law. The repairs that the landlord claims to have made, though he does not come here to so advise the Court, were repairs after other tenants had resided there. That fact is proven by what the landlord himself said to Mr. Quarles, about those who had roomed there before as tenants; likewise, mail came addressed in that box to other parties whom the Court may presume, from such testimony, had previously used those premises as
19 tenants, but I do not presume that, I merely call attention to that as what Mr. Quarles testified about.

The testimony of Mr. Quarles, and, his wife, is quite satisfactory, and, no one could hear them testify without knowing, feeling they were testifying to the truth.

Judgment in this case may go for $1,153.58, which is neither double nor treble, but which does cover a penalty of $50.00.

I ask you to draw the judgment, Mr. Gibbons, if you will, please.

Mr. Gibbons:

Yes, Your Honor.

The Court:

To be okayed by the other side as to form.

In United States District Court

APPELLANTS' STATEMENT OF POINTS ON APPEAL

The defendants, Warren V. Moore and Mrs. Warren V. Moore set forth the following points on which they intend to rely on appeal:

(1) The Court erred in denying defendants' motion to dismiss the complaint.

(2) The Court erred in admitting in evidence over defendants' objection the testimony of the witness, Gibbons, concerning the maximum legal rental on the accommodations involved.

20 (3) The Court erred in overruling defendants' motion to strike the testimony of the witness, Gibbons, concerning the maximum legal rentals on the accommodations involved herein.

FRANK CUSACK,
of
COX & CUSACK,
Attorneys for Defendants.

322 West Jefferson, W-9134,
Dallas, Texas.

21-22 Clerk's Certificate to foregoing transcript omitted in printing.

23 IN UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

CERTIFICATE OF CLERK, U. S. DISTRICT COURT AS TO CORRECTION IN RECORD—Filed January 16, 1950

UNITED STATES OF AMERICA,
Northern District of Texas, ss:

I, George W. Parker, Clerk of the United States District Court for the Northern District of Texas do hereby certify that the original complaint was filed June 29, 1949, in cause No. 3678 Civil, styled United States of America versus Warren V. Moore and wife.

Witness my hand and the seal of said court at Dallas, Texas, this 12th day of January, 1950.

[SEAL.]

GEORGE W. PARKER, Clerk,
U. S. District Court,
Northern District of Texas.
By (Signed) RAMELLE HAMILTON,
Deputy.

In the United States Court of Appeals for the Fifth Circuit

ARGUMENT AND SOBMISSION

Extract from the Minutes of April 19, 1950.

No. 13031

WARREN V. MOORE AND MRS. WARREN V. MOORE

versus

UNITED STATES OF AMERICA

On this day this cause was called, and after argument by Frank Cusack, Esq., for appellants, and Francis X. Riley, Esq., Special Litigation Attorney, Office of the Housing Expediter, for appellee, was submitted to the Court.

 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13031

WARREN V. MOORE AND MRS. WARREN V. MOORE, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of Texas

Before HOLMES, WALLER and BORAH, Circuit Judges

OPINION OF THE COURT—Filed May 17, 1950

WALLER, *Circuit Judge:*

The United States, through the Housing Expediter, brought this action on June 29, 1949, for damages, injunction against further violation, and for restitution of rent overcharges, pursuant to Sections 205, 206 (a), and 206 (b), of the Housing and Rent Act of 1947, as amended [50 U. S. C. A. 1881, et seq.]. However, prior to the filing of this suit, the Housing Expediter, in conformity with action taken by the City of Dallas under Section 204 (j) (3) of the Act, had terminated rent control in that city. Based upon such abolition of rent control, Appellants moved to dismiss the suit. The motion was denied without opinion and the case pro-

ceeded to trial with the result that judgment was entered requiring the Defendants to make restitution to tenant J. R. Qualls in the amount of $1093.48, and to pay the United States the minimum sum of $50.00. The Court below, doubtless, declined to dismiss the action because of the saving clause of the Emergency Price Control Act of 1942 [50 U. S. C. A., Sec. 901], or the general saving clause [1 U. S. C. A., Sec. 109], as construed by this Court in *United States* v. *Carter*, 171 F. 2d 530.

It seems clear that any suit at law for damages, to the extent not barred by the one-year statute of limitations, that had accrued prior to the decontrolling of Dallas might still be enforced for such damages notwithstanding the termination of control. But whether rights of action for injunction and restitution were kept alive requires consideration of the function of an injunction suit and the relation of restitution to such injunction suit.

It was conceded in oral argument, as, indeed, it must be here, that a right to an injunction to prevent future violations of the Rent Control Act cannot be maintained when rent control has been terminated according to law, as in Dallas. It follows, therefore, that the Plaintiff, at the time of the filing of this suit, had no valid, surviving cause of action in equity for injunction after the termination of rent control. Consequently the Court below should have dismissed so much of the Plaintiff's suit as sought injunction, as well as its prayer for restitution if restitution is merely an incident to the equity suit for injunction.

There seems to have emerged out of the case of *Porter* v. *Warner Holding Company*, 328 U. S. 395, a notion that restitution is in and of itself a cause of action, of which equity has jurisdiction. This is a misconception of the nature of restitution. It is now, and always has been, a type of *relief* afforded as an incident to suits at law as well as in equity, but which equity had no jurisdiction to grant unless it had acquired jurisdiction of a cause in equity involving a primary right under equitable principles. However, if equity has such jurisdiction of the primary cause of action, it can, and will, grant complete relief by ordering restitution when appropriate to the doing of full justice.

In other words, restitution is ancillary, auxiliary, incidental, or adjunctive to a cause of action of which equity has jurisdiction. It is elementary that equity does not take jurisdiction where there is an adequate remedy at law,[1] and that equity does not have

[1] Equity ordinarily does not have jurisdiction of a purely legal demand. However, it may order restitution of a specific thing or chattel, or for the establishment of a lien. Remedy in equity not available where adequate remedy at law. See "Restatement of the Law of Restitution", page 4.

jurisdiction to grant judgment for the payment of money except as an incident to a case of equitable cognizance in order that complete and full justice may be done. For instance, in a suit for rescission the Court may direct that the defendant restore the specific property of the plaintiff or, in the event the specific property has been damaged or disposed of, then to return its equivalent in money. Restitution is not only an adjunct of an equitable cause of action, but it is a form of relief commonly granted in suits of
26 law, such as replevin, or even in tort actions,[2] trover or ejectment, but, historically, there is no such thing as an action of restitution for a money judgment either in law or equity.[3]

But all of this was made quite clear by the decision in *Porter* v. *Warner Holding Company, supra.* There the Court said:

> "It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court *once its equity jurisdiction has been invoked under* § 205 (a). * * * It expressly envisages applications by the Administrator for orders enjoining violations of the Act and for orders enforcing compliance with the Act; and it expressly authorizes the District Court, upon a proper showing, to grant 'a permanent or temporary injunction, restraining order, or other order.' * * * An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories:
>
> "(1) *It may be considered as an equitable adjunct to an injunction decree.* * * * To be sure, *such a recovery could*

---

[1] The most complete and comprehensive test to the existence of equity jurisdiction is this formula: Equity jurisdiction extends to and embraces all civil cases, and none others, in which there is not a full, adequate, and complete remedy at law. See: *Grand Chute* v. *Winegar*, 15 Wall. 373; *Ins. Co.* v. *Bailey*, 13 Wall. 616; *Hipp, et al.* v. *Babin, et al.*, 19 How. 271; *Parker* v. *Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black 545.

[2] Restitutionary relief may be awarded in tort actions such as replevin, ejectment, and trover. See "Restatement of the Law of Restitution", pp. 522-523.

[3] A claim to a restitutionary right is not a ground of equitable jurisdiction. In order to be entitled to recover money by way of restitution in an equity action there must also exist grounds for invoking the jurisdiction of equity. Restatement of the Law of Restitution, pp. 1-2.

not be obtained through an independent suit in equity if an adequate legal remedy were available. [Citing cases.] *But where,* as here, *the equitable jurisdiction of the court has properly been invoked for injunctive purposes,* the court has the power to decide all relevant matters in dispute *and to award complete relief* even though the decree includes that which might be conferred by a court of law. * * *

"(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act. * * * *Future compliance* may be more definitely assured if one is compelled to restore one's illegal gains; * * *

"The legislative background of § 205 (a) confirms our conclusion that the traditional equity powers of a court remain unimpaired in a proceeding under that section so that an order of restitution may be made. * * *

"* * * To the extent that damages might be properly awarded in a court of equity in the exercise of its jurisdiction under § 205 (a), * * * § 205 (c) supersedes that possibility and provides an exclusive remedy relative to damages. It establishes the *sole means* whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in the nature of penalties. *Moreover, a court giving relief under* § 205 (c) *acts as a court of law rather than as a court of equity.* * * * (Emphasis added.)

By the termination of rent control in Dallas the Expediter was shorn of all power to enforce such control in the future; that is to say, no longer was there a right to an injunction to prevent violations and to enforce control in an area that had lawfully been decontrolled. Restitution, being, as Mr. Justice Murphy held, "an equitable adjunct to an injunction decree" or "other order" which the Court could enter to aid in bringing about enforcement of the Act, was neither appropriate nor issuable when there was no longer any control to violate or violations to enjoin, and hence there remained no proceeding of which equity would have jurisdiction to which restitution could be adjunctive. A right to enforce by injunction a control that has expired is certainly not within the saving clause of either of the statutes.

This leaves the Expediter solely with a right of action for the recovery of overcharges that have occurred within one year from the bringing of the suit, plus the damages which the statute permits in a suit at law.

This Court has held, in *Creedon* v. *Randolph*, 165 F. 2d 918, and in *Co-Efficient Foundation* v. *Woods*, 171 F. 2d 691, that the period of limitations provided under Section 205 (c) of the

Emergency Price Control Act was not applicable to an equitable action for injunction and restitution under the Act when such equitable action was not sought to enforce some purely legal right. But in the present case there is no right of action surviving for an injunction, and no other equitable action to which restitution could be an adjunct, with the result that under the legal action that survives decontrol the statute of limitations of one year is in full force and effect.

The only other question involved in the case is based upon the admission of oral testimony rather than the available record evidence as to the maximum rent allowable for the premises in question. Defendants objected on the ground that the record showing the maximum legal rental on the accommodations involved was the best evidence. This objection would have been good and sustainable had it not been for the fact that the Defendants, in Paragraph 2 of their answer, admitted the amount of the maximum rental, as well as the amount of the overcharges, and averred that they had tendered and offered to pay same to the tenant. In
28 the light of these admissions the lower Court was without error in overruling the objections of the Defendants. There was no burden on the Plaintiff to prove facts which the Defendants by their pleadings had theretofore fully admitted.

The cause is remanded with directions to dismiss the suit insofar as it seeks an injunction and restitution, and for a new trial for any overcharges, together with damages, as may have accrued within one year from the date of the filing of the complaint.

IN UNITED STATES COURT OF APPEALS

No. 13031

WARREN V. MOORE AND MRS. WARREN V. MOORE

versus

UNITED STATES OF AMERICA

JUDGMENT—Extract from the Minutes of May 17, 1950.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the suit insofar as it seeks an injunction and restitution, and for a new trial for any overcharges, together with damages, as may have accrued within one year from the date of the filing of the complaint.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed June 2, 1950

To the Honorable United States Court of Appeals for the Fifth Circuit:

Now come Warren V. Moore and Mrs. Warren V. Moore, appellants, and respectfully petition the Court for re-hearing of the appeal herein, basing such petition on the following grounds:

1

The holding of the Court that the admission of testimony concerning the maximum legal rent on the premises, was not error, by reason of the allegations contained in paragraph 2 of the defendants' answer,[1] is an erroneous construction of the record and places a different construction thereon to that given by the Court and the parties in the Trial Court.[2]

29

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[1]Defendants would further show that the amount of rentals as collected from the tenant, J. R. Qualls as evidenced by his checks which he holds as receipts therefor was the sum of $22.00 per month during such term, that said tenant, J. R. Qualls paid said sum voluntarily and insisted upon paying the same with full knowledge of the fact that the *claimed registration* of the housing accommodations was at the rate of $18.00 per month, and that the said defendants have tendered and offered to the said J. R. Qualls and to the office of the Housing Expediter said excess payment, and that they are now ready, able and willing to make such refund and should not be held liable for triple damages or any costs of Court herein. (R. p. 6) (Italics ours.)

[2]The construction placed on paragraph 2 of defendant's answer in the Trial Court by all of the parties, was only to the effect that the defendants recognize that the United States "claimed" a registration of the housing accommodations at $18.00 per month, and that the tenant voluntarily and without any wilfullness on the part of the defendants, paid the sum of $22.00 for which reasons, the defendants having theretofore tendered, and still tender any excess payment, they should not be held for triple damages or any costs. In the light of this construction in the Court below, this Court should not allow its opinion to stand, making the law of the case by holding such allegations to be an admission, relieving the plaintiff of the burden of proving a maximum legal rental.

2

The Court has erroneously established the law of the case in holding that the allegations in paragraph 2 of the defendants' answer, admitted a maximum legal rent, and such holding deprives the defendants of the liberal rule of construction of pleadings contemplated under Rule 8, Federal Rules of Civil Procedure, and abridges the right to inconsistent pleadings.[3]

30 3

The holding of this Court that the defendants in paragraph 2 of their answer, cured any error in the admission of the testimony as to maximum legal rental, if to become the law of this case, should be clarified as to the extent of the Court's holding, and such holding limited to the effect that such allegations are binding on the defendants in this appeal only, for that in the light of a new trial, such holding should not operate to abridge defendants' right under Rule 15, Federal Rules of Civil Procedure, to move for leave to amend so as to effect the ends of justice, as the sole issue on a new trial of this case is whether the housing accommo-

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[3] The construction placed by the Trial Court and by the parties in the Court below in paragraph 2 of the defendants' answer was merely to the effect of avoiding the charge of wilfulness. This is clearly borne out by the allegation itself "*Claimed Registration of the Housing Accommodation*", for it was never conceded or intended to admit that there was a registration or a maximum legal rental on the accommodation involved in this action. That the United States in the Court below did not consider paragraph 2 as an admission, is amply borne out from the record wherein they undertook to sustain the burden of proving a maximum legal rent. Outside of the record as presented in this Court, but within the record in the Court below, such construction is further sustained by the fact that after the service on the United States of the defendants' answer, the United States served request for admission, in which it was sought to have the defendants admit the registration and the maximum legal rental, which the defendants answered. The construction placed on paragraph 2 by this Court was raised for the first time by the United States in this Court in appellee's brief, page 23, where they wholly fail and neglect to give effect to the allegation "claimed registration", and such change in position should not be allowed to the prejudice of appellants on a new trial.

dations involved were controlled accommodations with a legal maximum rent.[4]

31 WHEREFORE, it is respectfully submitted that a rehearing should be granted to the extent herein above indicated.

(signed) FRANK CUSACK,
FRANK CUSACK of COX & CUSACK,
322 West Jefferson Y8-9134,
Dallas, Texas,
Counsel for Appellants.

The foregoing petition is believed to be well founded in point of law and has not been filed for the purposes of delay, and a copy hereof, has been served on counsel for appellee by mailing a copy thereof to Ed Dupree, General Counsel, Office of the Housing Expediter, Washington 25, D. C., this — day of —, 1950.

(Signed) FRANK CUSACK,
Attorneys for Appellants.

In the United States Court of Appeals for the Fifth Circuit

[Title omitted]

PETITION FOR REHEARING (APPELLEE)—Filed June 7, 1950

The House Expediter, appellee herein, respectfully requests that this Honorable Court grant a rehearing of the argument heretofore had before this Court (Holmes, Presiding Judge, Waller and Borah, Circuit Judges, sitting) in New Orleans, Louisiana, April 19, 1950. In conjunction with this petition, the Housing Expediter further requests that the printing of the opinion heretofore rendered by this

[4] It is very probable that this Court's opinion is susceptible of a construction that the law of the case has been established binding on these defendants on a new trial, depriving them of any right to ask the Trial Court for leave to amend prior to a new trial, in order to remove any question such as the Court has held on this appeal through the inadvertent choice of language of counsel in pleading. It will be remembered that in oral argument of this case, the appellants represented to this Court, and again represent to this Court that their earnest contention in the Court below, and here, is that the accommodations involved in this suit, were not controlled, and that the United States, without the holding herein establishing the law of the case, can never by legally competent evidence, establish those facts.

Court on May 17, 1950, be withheld pending the disposition of appellee's petition for a rehearing.[1]

Appellee's petition for rehearing is based upon the following grounds:

1. The ruling herein is contrary to its previous decision in *Creedon* v. *Randolph*, 165 F. 2d 918; it restates principles which it expunged upon rehearing in *Woods* v. *Selber*, 171 F. 2d 900;
32 and it is also inconsistent with *Jackson* v. *Woods*, decided by this Court on May 17, 1950.

2. This decision is also clearly at odds with the holding of the Supreme Court in *Porter* v. *Warner Holding Co.*, 328 U. S. 395.

3. It is likewise contrary to the conclusions reached by every other Federal Circuit Court which have had occasion to pass upon the question; of the Third, in *Woods* v. *Wolfe*, No. 10047, decided May 18, 1950; of the Fourth, in *Woods* v. *Wayne*, 177 F. 2d 559; of the Fifth, in *Creedon* v. *Randolph*, 165 F. 2d 918; of the Sixth, in *Bowles* v. *Skaggs*, 151 F. 2d 817, and in *Woods* v. *Witzke*, 174 F. 2d 855; of the Eighth in *Ebeling* v. *Woods*, 175 F. 2d 242; of the Ninth, in *Woods* v. *Richman*, 174 F. 2d 614, *Woods* v. *McCord*, 175 F. 2d 919, and *Woods* v. *Gochnour*, 177 F. 2d 964.

These grounds will be considered in order.

1. This Court in *Creedon* v. *Randolph*, 165 F. 2d 918, expressly overruled the District Court for the Southern District of Florida, which had held that a court of equity could not order restitution unless it had prior equity jurisdiction. The decision in the case at bar returns to that repudiated doctrine. In reversing the lower Court in the instant case this Court stated "* * * restitution is ancillary, auxiliary, incidental, or adjunctive to a cause of action of which equity has jurisdiction" (P. 3, Slip Opinion).

Having made that determination this Court dismissed the Expediter's action for restitution on the ground that "there remained no proceeding of which equity would have jurisdiction to which restitution could be adjunctive" (P. 6, Slip Opinion).

Let us examine the *Randolph* case in the light of this doctrine. The facts there were briefly as follows: The defendant, a resident of New Jersey, leased an apartment for the winter in Florida in 1944-45 (R. 8-9);[2] she sublet the apartment for the latter portion of the term (February 16, 1945 to May 1, 1945 (R. 8)) and returned to New Jersey (R. 10-11); Suit was filed on January 11,

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[1] And the decision in *Woods* v. *Jackson* (Nos. 12948 and 12955) decided May 17, 1950.

[2] The "R" references are to the record in the *Randolph* case on file in this Court, No. 12094, filed August 16, 1947.

1947, pursuant to Section 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 925 (a)) (R. 1); the sole prayer for relief was restitution of the overcharge. The prayer for relief did not include injunctive relief (R. 6).[3] The defendant defaulted (R. 6); upon proof the Expediter established the overcharge (R. 6-11); and the lower Court took the case under advisement (R. 11).

33 The Court subsequently filed a memorandum decision in which it decided against the Expediter (R. 11-12), and then entered a judgment in favor of defendant (R. 12). In its opinion[4] the District Court stated that the Expediter was not entitled to a judgment because: "Here no equitable relief is sought. The Act complained of was committed a long time ago and no threatened present or future violations of the Act are charged in the complaint. There is, therefore, no legal basis for this Court to exercise the 'traditional equity power' and in so doing order restitution of the alleged overcharge" (R. 12).

This Court reversed that ruling (Sibley, Presiding Judge, Holmes and Waller, Circuit Judges, sitting) because, "In this we think there was error" (165 F. 2d at 919). In its opinion this Court expressly rejected the necessity of the existence of injunctive jurisdiction as a condition precedent to ordering restitution. In this connection the Court said, at p. 919:

> Here the Administrator did not ask for a prohibitory injunction against future violations, and probably would not have gotten it if he had.

This Court then expressly held that restitution was a proper remedy in and of itself and emphatically repudiated the contention that restitution was dependent upon injunctive relief.

> It is a remedy which may be had *in addition* to the others set up in the Act, and an order of restitution may be granted with or *without a prohibitory injunction*" (165 F. 2d at p. 920). [Italics added.]

The foregoing language unequivocally conflicts with the following doctrine as stated in the case at bar:

> * * * equity does not have jurisdiction to grant judgment for the payment of money except as an incident to a case of equitable cognizance in order that complete and full justice must be done (P. 4, Slip Opinion).

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[3] This Court has considered restitution to be in the nature of a "mandatory injunction." *Creedon* v. *Randolph*, 165 F. 2d at p. 919.

[4] The memorandum decision is set forth in full, *infra*, p. 10.

The citation of *Creedon* v. *Randolph*, in the opinion in the instant case (P. 6) without specifically reversing it, creates an irreconcilable conflict of authority for the lower Courts and practitioners of this Circuit.

(a) In the case of *Woods* v. *Selber*, 171 F. 2d 900, this Court filed an opinion in which it stated that restitution was "incidental"
34 to injunctive relief. In that opinion (Case No. 12322) filed November 17, 1948, this Court stated (on page 9 of the Slip Opinion):

> In bringing the action under subsection (a) the complaint was likewise in conformity with the Act, as construed by the Supreme Court, in seeking (1) the equitable remedy of injunction and (2) the incidental relief by restitution of the overcharge to the tenant.

On January 18, 1949, in response to appellant's petition for a rehearing, the court deleted that language thereby bringing it into conformity with the previously expressed opinion of this Court in *Creedon* v. *Randolph*. The petition for rehearing of the Expediter in the *Selber* case was based upon the prior holdings of the Supreme Court and this Court as evidenced by the *Randolph* and the *Warner Holding Company cases* (see p. 5, petition for rehearing).

(b) Furthermore, the decision herein is inconsistent with the opinion filed the same day in *Jackson* v. *Woods* (No. 12948). On page 2 of the Slip Opinion of the *Jackson* case this Court upheld a judgment of restitution over appellant's objection on the ground that the right to "relief of restitution did not expire at the time of the filing of the suit." This language is contradictory to the *Moore* decision since it implies that although the suit was filed prior to the termination of rent control, a judgment for restitution would be possible after decontrol. Since the Expediter's right to prohibitive injunctive relief would have expired under the *Moore* doctrine with the termination of rent control, there would be no jurisdiction upon which to base the "incidental" relief of restitution.

2. The decision of the Court in this case is clearly at odds with the ruling of the Supreme Court in *Porter* v. *Warner Holding Company*, 328 U. S. 395. *The Warner Holding Company* case was accepted for consideration by the Supreme Court for the sole purpose of determining whether restitution was possible as a means of relief pursuant to Section 205 (a) of the Emergency Price Control Act (id. p. 397). The Supreme Court held that restitution was a proper remedy pursuant to said section on either of two possible theories: (1) "as an equitable adjunct to injunctive relief." (id. p. 399); *or* (2) "as an order appropriate and necessary to enforce compliance with the Act" (id. p. 400). If the opinion of this court

in the instant case means what it says, that is, that restitution is "ancillary, auxiliary, incidental, or adjunctive to a cause of action * * *" (P. 3, Slip Opinion), then the second basis for granting restitution under the *Warner Holding Company* case is totally meaningless. If the first ground referred to by the Supreme Court for granting restitution be "adjunctive" to an injunction then it must necessarily follow that the second alternative ground which includes no reference to the word "adjunct" means that restitution need not be "adjunctive" to injunctive relief. Any other interpretation of the opinion and the language of the Supreme Court would require part 2 of that decision to be disregarded as surplusage.

3. On page 2 above, we have listed six of the Federal Circuit Courts, including this one, which had previously passed upon this question and held contrary to the decision of this court. These Circuit Courts have unanimously followed the reasoning first set forth by this Court in the *Randolph* case, *supra*, and in almost every instance have cited that case as a controlling authority. The most recent decision is *Woods* v. *Wolfe* (No. 10047 (C. A. 3), decided May 18, 1950. In that opinion[5] which was issued by the Third Circuit "for the future guidance of the courts of this circuit,"[6] the court stated that injunction was one type of equitable relief possible and that restitution was another independent type of equitable relief possible pursuant to Section 205 (a) of the Price Control Act, and Section 206 (b) of the Housing and Rent Act under the doctrine as established in the *Warner Holding Company* case. Speaking for the Court, Chief Judge Biggs said:

> Congress made available to the Expediter through Section 205 (a) an armory of the weapons of equity. One of these weapons is the injunctive process; another is restitution. Neither one is dependent upon the other. Both may be availed of, or one or the other successfully employed.

This doctrine has similarly been expressed by the Fourth Circuit in *Woods* v. *Wayne*, 177 F. 2d 559 where Judge Soper speaking for the Court said:

> If it is shown that illegal exactions were made under either statute, the court has power to order restitution in this suit, even if upon further hearing the court may find that no restraining order as to the defendant's future conduct is necessary or proper. See *Creedon* v. *Randolph*, *supra*; *Woods* v. *McCord*, *supra* (177 F. 2d at 561).

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[5] The entire opinion appears in the Appendix, infra, pp. 11-15.

[6] *Infra*, p. 13.

36 *Conclusion*

For the foregoing reasons, it is respectfully submitted that appellee's application for rehearing be granted.

Respectfully submitted,

ED DUPREE,
General Counsel,
LEON J. LIBEU,
Assistant General Counsel,
FRANCIS X. RILEY,
Special Litigation Attorney,
Office of the Housing Expediter,
Washington 25, D. C.

Certificate of Attorney

There comes now Francis X. Riley, an attorney for the Office of the Housing Expediter, who certifies that he has read the opinion in the above entitled matter; that he knows the contents thereof, and that this petition is filed in good faith and not for the purposes of delay.

Special Litigation Attorney.

APPENDIX

MEMORANDUM DECISION

Early in 1945 the defendant rented certain premises in St. Petersburg, Florida, to one Mrs. Grace Meckenberg for a period of three months for the sum of $385.00. Plaintiff claims the legal rent for said premises during said period was $225.00 and that the tenant was overcharged in the amount of $160.00. Long after the statute of limitations had barred the right of the tenant or the Administrator to institute suit for recovery of the overcharge, under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, the Administrator brought this suit under Section 205 (a) of the Act, praying "That the defendant be ordered and directed to return to such persons as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Act and Regulations * * *". No other equitable relief is sought by the complainant.

Defendant filed no Answer or other pleading in this case and a Judgment by Default has been entered against her.

Plaintiff relies upon *Bowles* v. *Skaggs*, 151 Fed. 2d 817 and *Porter* v. *Warner Holding Company*, 328 U. S. 395 to support this unusual proceeding. The cases relied upon were suits by the Administrator invoking the equity jurisdiction of the Court to enjoin violation of

the Price Control Act, as authorized by Section 205 (a) of
37 said Act, and as the courts point out in these cases the power of the court to order restitution was based entirely upon the exercise of its general equity jurisdiction. Here no equitable relief is sought. The act complained of was committed long ago and no threatened present or future violations of the Act are charged in the complaint. There is, therefore, no legal basis for this court to exercise the "traditional equity powers" and in so doing order restitution of the alleged overcharge.

A judgment will be accordingly entered for the defendant.

Dated at Tampa, Florida, this 13th day of May 1947.

DOZIER A. DEVANE,
Judge, United States District Court.

OPINION OF THE COURT

(Filed May 18, 1950)

By BIGGS, *Chief Judge.*

This is a suit brought by the Housing Expediter (then Creedon, now Woods) against the defendants, the Wolfes, alleging that overcharges had been made in violation of Section 4 (a) of the Emergency Price Control Act of 1942, 50 U. S. C. A. App. § 904 (a), as amended. Jurisdiction in the court below was invoked pursuant to Sections 205 (a) and (e) of the Emergency Price Control Act, 50 U. S. C. A. App. §§ 925 (a) and (e); and Section 206 (b) of the Housing and Rent Act of 1947, 50 U. S. C. A. App. § 1896 (b), the latter Act having been enacted on July 1, 1947 to continue and maintain the maximum rentals prescribed pursuant to the Emergency Price Control Act.

The pertinent facts are as follows. The Wolfes own a house in Philadelphia. They rented a room to the Slavins from November 1[illegible], 1942 to December 12, 1946. The maximum legal rental for the room was $30.00 a month. The defendants charged $40.00 a month, $30.00 of which was paid by the Slavins by check, the balance, $10.00, being paid in cash. These facts were found by the court below on ample evidence. The court decided that violations had been committed by the defendants and ordered them to make restitution to the Slavins in the amount of $470.00, to be paid through the Office of the Housing Expediter. The trial judge also enjoined the defendants from soliciting or receiving rents in excess of the maximum legal rents permitted by the Housing and Rent Act of 1947 or the regulations promulgated thereunder. In connection with the injunctive relief granted by the court below, the learned trial judge found: "That, in view of the violations shown, it is reasonable to

believe that unless restrained the defendants will violate the
38 rent regulations when acting as landlords." The defendants have appealed.

The points raised by the defendants require no extended discussion. The Wolfes first assert that the court below erred in granting the injunction contending that no immediate need for such relief existed and that the injunctive process of the court below was in effect employed only to punish the defendants for their past misdeeds. In this connection the defendants emphasize the fact that the room which had been rented by them to the Slavins had been taken over by their son and that they were not acting as landlords at the time of the trial or at the time of the entry of the judgment complained of. The Wolfes allege, second, that the injunction served no public interests, that it merely provided "the basis for awarding money damages to the tenants."

We agree that an injunction may not be imposed on a defendant to punish him for his past misconduct or be employed merely as a basis for jurisdiction which otherwise would not exist. Such, however, was not the use of the injunction here. As we have indicated the Wolfes had increased the rental charge $10.00 a month for a period of 48 months, making use of a cash-check device as demonstrated by the evidence. There can be no question but that they possessed guilty knowledge and guilty intent. While the district judge refused to make a finding as requested by the defendants that the room was occupied by the defendants' son, he stated that he would assume nonetheless that the room was occupied by the son. We will assume, as did the court below, that this was the fact. The defendants therefore take no harm from the court's refusal to make the requested finding. On the merits we agree with the conclusion of the court below that because the defendants are presently in a position, perhaps temporarily, where they could not violate the law, it does not mean that they might not be quick to violate it again. A four-year-long period of prior deliberate misconduct requires a strong showing that the offending individuals are actually in *locus paenitentiae*. The Wolfes have made no such showing. Under the circumstances we cannot say that the court below abused its discretion in issuing the injunction. *Bowles* v. *Leithold*, 3 Cir., 155 F. 2d 124, 125.

Having so ruled it becomes unnecessary to discuss the second branch of the defendant's argument. For the future guidance of the courts of this circuit it is not out of place, however, to dispose of the contention involved. The Wolfes insist that Section 205 (a) of the Emergency Price Control Act will not support restitution unless the court possessed the jurisdiction to issue an injunction. Since, say the defendants, the court below was without jurisdiction to issue the injunction for the reasons asserted by the defendants

and already discussed in this opinion, the court cannot com-
39 pel restitution under Section 205 (a).[1] They construe *Porter* v. *Warner Co.*, 328 U. S. 395, and *Hecht Co.* v. *Bowles*, 321 U. S. 321, 328, in a way which would prohibit recovery by the Expediter. We agree with the defendants that the Porter decision is largely dispositive of this issue in the instant case but we cannot agree with the defendants' construction of that decision. The order of restitution in the instant case as in Porter "* * * may be considered as an order appropriate and necessary to enforce compliance with the Act." Mr. Justice Murphy went on to say, "Section 205 (a) anticipates orders of that character [viz., orders for restitution], although it makes no attempt to catalogue the infinite forms and variations which such orders might take." 328 U. S. at p. 400. The defendants insist that the sentence which follows the words last quoted, "The problem of formulating these orders has been left to the judicial process of adapting appropriate *equitable*[2] remedies to specific situations.", compels a decision of the issue in their favor. They say in effect that restitution is in the nature of a remedy at law and since the court was without jurisdiction to grant the equitable remedy of injunction, likewise it must be deemed to be without power to grant the remedy of restitution.

The answer to the contention is that the Supreme Court has held restitution to be a proper *equitable* remedy under Section 205 (a). See *Porter* v. *Warner Co.*, *supra*, and *Ebeling* v. *Woods*, 8 Cir., 175 F. 2d 242, 244. Congress made available to the Expediter through Section 205 (a) an armory of the weapons of equity. One of these weapons is the injunctive process; another is restitution. Neither one is dependent upon the other. Both may be availed of, or one or the other successfully employed. The defendants try to draw a sharp distinction between actions at law and actions in equity as exemplified respectively by Sections 205 (a) and 205 (e). It is true that Section 205 (e) might be described as a remedy "at law", and Section 205 (a) as supplying remedies "in equity" as distinguished from those "at law". But even if this unwitty diversity be insisted upon it remains clear that Congress could give, and the Su-

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[1] As a counterpart to this argument the Wolfes point out that Section 205 (e) of the Act, which provides a remedy for the collection of damages for over ceiling violations, requires that suits be instituted within one year of the violation; here the last violation took place on November 12, 1946, and suit was not instituted until August 28, 1947. Recovery under the section last cited would be based on overcharges made after August 28, 1946, and would include only three such overcharges. We agree with the defendants that recovery of damages under Section 205 (e) would be limited.

[2] Emphasis added.

preme Court has ruled that Congress has given, to the Ex-
40 pediter the remedies prescribed in Section 205 (a) including the remedy of restitution. The views expressed here are in accord with those of other courts. See *Woods* v. *Wayne*, 4 Cir., 177 F. 2d 559, 560; *Woods* v. *Witzke*, 6 Cir., 174 F. 2d 855, and the other cases cited by Judge Soper in the Wayne case.

The judgment appealed from will be affirmed.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARINGS

Extract from the Minutes of July 17, 1950

[Title omitted]

It is ordered by the Court that the petitions for rehearing filed in this cause be, and the same are hereby, denied.

Clerk's certificate to foregoing transcript omitted in printing.

41 SUPREME COURT OF THE UNITED STATES

No. 344—October Term, 1950

ORDER ALLOWING CERTIORARI—Filed November 27, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 344

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

WARREN V. MOORE AND MRS. WARREN V. MOORE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

WARREN V. MOORE AND MRS. WARREN V. MOORE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the district court (R. 17) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 24) is reported in 182 F. 2d 332.

JURISDICTION

The judgment of the court below was entered on May 17, 1950 (R. 28). Petitions for rehearing were denied on July 17, 1950 (R. 40). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the judicial authority contained in Section 206(b) of the Housing and Rent Act of 1947, as amended, to issue an "order enforcing compliance" with any provision of that Act or order issued thereunder, empowers a court to order a landlord to make restitution of overceiling rentals received by him in a defense-rental area which was decontrolled after the occurrence of the violations but prior to the filing of the suit against the landlord.

STATUTES INVOLVED

The pertinent provisions of the statutes involved read as follows:

The Housing and Rent Act of 1947 as amended (61 Stat. 193; 62 Stat. 93; 63 Stat. 18; 50 U. S. C. App. (Supp. III) 1891 *et seq.*:[1]

SEC. 206(a) It shall be unlawful for any person to demand, accept, or receive any rent for the use or occupancy of any controlled

[1] The Housing and Rent Act of 1947, as amended, was further amended and was extended to June 30, 1951 by the Act of June 23, 1950. Pub. Law 574, 81st Cong., 2d sess.

housing accommodations in excess of the maximum rent prescribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 206(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

The Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U. S. C. App. 901 *et seq.*

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court

for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

STATEMENT

Respondents, Warren V. Moore and Mrs. Warren V. Moore are landlords of housing accommodations in Dallas, Texas. Between October 1, 1947, and May 31, 1949, they demanded and received rents in excess of those permitted by the applicable maximum rent regulation [2] issued under the Housing and Rent Act of 1947, as amended (hereinafter sometimes referred to as "the Act"). Respondents having refused to comply with the Act and regulation, petitioner brought this action against them pursuant to Sections 205 and 206(a) and (b) of the Act for statutory damages, injunctive relief, and for an order of restitution compelling respondents to refund to their tenant the excess of rents collected over the legal maximum (R. 1). Prior to the filing of the suit, the Housing Expediter, pursuant to action taken by the City of Dallas under Section

[2] Controlled Housing Rent Regulation, as amended, 12 F. R. 4331; 13 F. R. 1861; 14 F. R. 1571.

204(j)(3) of the Act,[3] had terminated federal rent controls in that city. 14 F. R. 3494. Basing their action on the fact that rental housing in Dallas, Texas, had been decontrolled, respondents moved to dismiss the suit (R. 24). Their motion was denied by the trial court without opinion (R. 24). The suit was thereafter tried and resulted in a judgment directing respondents to make restitution to the tenant, J. R. Qualls, in the amount of $1,093.48, and because of "some evidence * * * of wilfulness" the court directed petitioners to pay to the United States statutory damages in the amount of $50.00 (R. 18-19). Respondents appealed from this judgment[4] (R. 11).

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[3] Section 204(j)(3) at the time of the decontrol of rental housing in Dallas, Texas, read as follows:

> The Housing Expediter shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village; *Provided, however*, That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter: *And provided further*, That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area. [63 Stat. 21; 50 U. S. C. App. (Supp. III) 1894(j)(3).]

[4] The petition for certiorari filed herein is directed solely to the ruling of the court below on respondent's appeal with respect to the order for restitution. Petitioner filed a cross-appeal from that part of the trial court's judgment which gave statutory damages for less than the amount of the established overcharges. The ruling of the court below on the cross-appeal, 182 F. 2d 336, is not challenged here.

The court of appeals reversed the judgment of the trial court to the extent that it directed respondents to make restitution of overcharges, and remanded the cause with directions to dismiss the suit in so far as it sought a prohibitory injunction and restitution of overceiling rentals, and for a new trial for any overcharges, together with such damages as might have accrued within one year from the date of the filing of the complaint (R. 28). The court of appeals rested its decision on the theory that restitution of overceiling rentals is merely ancillary or adjunctive to injunctive relief and cannot be ordered in the absence of power to grant an injunction. Consequently, it held that since the Housing Expediter had been "shorn of all power to enforce * * * control in the future" in Dallas, Texas, by the termination of rent control in that city, the trial court was without authority in this case to grant an injunction against future violations of the Act and hence without power to order restitution of the illegal rentals (R. 27).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that an order compelling a landlord to make restitution of overceiling rents received by him is solely an adjunct to an injunctive decree prohibiting future violations of the Housing and Rent Act, is in conflict with the reasoning of this Court in *Porter* v. *Warner*

Holding Co., 328 U. S. 395. In the *Warner* case, this Court had under consideration Section 205(a) of the Emergency Price Control Act of 1942, *supra*, pp. 3-4, the language of which was substantially the same as that contained in Section 206(b) of the Housing and Rent Act of 1927, *supra*, p. 3, This Court there held that an order issued under Section 205(a) of the Price Control Act for the recovery of illegal rents might be considered as a proper "other order" under that section "on either of two theories," (1) it might be "considered as an equitable adjunct to an injunction decree" (p. 399), or (2) it might be "considered as an order appropriate and necessary to enforce compliance with the Act" (p. 400). Thus, under the second of these theories a restitution order can issue regardless of whether a prohibitory injunction can be issued in the particular case. This Court's reference to the second theory would have been meaningless if restitution had been deemed permissible only when ancillary to injunctive relief.

In the *Warner* case this Court pointed out the effect of a restitution order, as follows (p. 400):

> And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal

gains; and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums.

In enacting the Housing and Rent Act of 1947, Congress used substantially the same language in Section 206(b) thereof, *supra*, p. 3, as it had used in Section 205(a) of the Price Control Act, *supra*, pp. 3-4. In the circumstances, Section 206(b) of the Rent Act should receive the same construction as that placed by this Court on Section 205(a) of the Price Control Act.

2. The decision of the court below is in conflict with the decisions of four other courts of appeal construing Section 205(a) of the Emergency Price Control Act of 1942 in light of this Court's holding in the *Warner* case. *Ebeling* v. *Woods*, 175 F. 2d 242 (C. A. 8) [5]; *Woods* v. *Wolfe*, 182 F. 2d 516 (C. A. 3) [6] *Woods* v. *Wayne*, 177 F. 2d 559 (C. A.

[5] "The opinion in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399-403, 66 S. Ct. 1086, 1089-1091, 90 L. Ed. 1332, however, is explicit, we think, that an equitable order for restitution of overcharges may be made under the Price Control Act, either as an adjunct to a prohibitory injunction or independently and without regard to whether such an injunction is being sought or has been denied." (*Ebeling* v. *Woods*, 175 F. 2d 242, 244.)

[6] "Congress made available to the Expediter through Section 205(a) an armory of the weapons of equity. One of these weapons is the injunctive process; another is restitution. Neither one is dependent upon the other. Both may be availed of, or one or the other successfully employed." (*Woods* v. *Wolfe*, 182 F. 2d 516, 518-519.)

4); *Woods* v. *Richman*, 174 F. 2d 614 (C. A. 9).[7] The decision of the court below is likewise in conflict with its own prior decision in *Creedon* v. *Randolph*, 165 F. 2d 918.[8] Each of the cases hold, on the authority of this Court's decision in the *Warner* case, that an order of restitution is authorized under Section 205(a) of the Emergency Price Control Act of 1942 without regard to whether a prohibitory injunction is sought or denied. See *Bowles* v. *Skaggs*, 151 F. 2d 817 (C.A. 6), which reached the same conclusion prior to the *Warner* decision. And in all of these cases, except the *Skaggs* and *Randolph* cases, *supra*, restitution was awarded after the Emergency Price Control Act of 1942 had terminated so that injunctive relief was no longer possible.

Authority to enforce rights and liabilities after the termination of the Price Control Act was vested in the courts by the saving provision in Section 1(b) of that Act (50 U. S. C. App. 901(b)). See

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[7] "The remedy afforded by § 205(a) is in addition to others set up in the Act; and an order of restitution may be granted with or without a prohibiting injunction." (*Woods* v. *Richman*, 174 F. 2d 614, 616.)

[8] See also *Jackson* v. *Woods*, 172 F. 2d 338, decided by the court below on the same day it decided the case at bar, wherein restitution was granted by the trial court and upheld on appeal. The housing accommodations in the *Jackson* case were likewise situated in Dallas, Texas, just as were the accommodations in the instant case. The complaint in the *Jackson* case was filed on February 11, 1949, prior to the time decontrol took effect in Dallas, which was on June 23, 1949. In the case at bar, the complaint was filed on June 29, 1949, a few days after the decontrol had gone into effect.

Fleming v. *Mohawk Co.*, 331 U. S. 111, 119; *Woods* v. *Hills*, 334 U. S. 210. A similar saving provision is contained in Section 204(f) of the Housing and Rent Act of 1947 (50 U. S. C. App. (Supp. III) 1894 (f)), which maintains in full force and effect after termination of the Act, all of its provisions and all orders issued thereunder for the purpose of sustaining suits with respect to rights and liabilities accruing prior to the termination. This provision is plainly broad enough to cover liabilities which arose prior to decontrol even where suit is not brought until after the decontrol takes place.

3. The decision of the court below, unless reversed, will govern the outcome of a large number of restitution cases, now pending in district courts within the Fifth Circuit, brought pursuant to Section 206(b) of the Housing and Rent Act in connection with violations which occurred in areas that are now decontrolled. Furthermore action to accomplish the decontrol of rental housing accommodations has been taken or is being contemplated by many cities of consequence. In addition, numerous other areas have been decontrolled by virtue of the authority contained in Section 204(c) and (k) of the Act (50 U.S.C. App. (Supp. III) 1894 (c) and (e)). Presumably the ruling of the court below would control in the Fifth Circuit regardless of the manner in which the decontrol of a defense-rental

area has been brought about.[9] In the circumstances, there is an urgent public need to have the decision of the court below brought into harmony with the holding of this Court in the *Warner* case, and to have resolved the conflict between that decision and the decisions of the other four courts of appeal cited above.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ED DUPREE,
General Counsel,
Office of the Housing Expediter.

OCTOBER, 1950.

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[9] Decontrol actions for the nation effective to and including September 8, 1950, undertaken by the various methods provided by the Act are set forth below:

Cumulative April 1, 1949, to September 8, 1950	Actions	Estimated Units	1940 Population
Expediter Initiative	554	1,351,901	15,822,865
Local Option	330	1,317,746	6,650,411
Local Option (County)	1	3,188	47,565
State Option	10	3,489,368	19,876,818
Board Recommendation	6	84,419	559,842
Total	901	6,246,622	42,957,501

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In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, *Petitioner*

v.

WARREN V. MOORE AND MRS. WARREN V. MOORE

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONER

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OCTOBER TERM, 1950

No. 344

UNITED STATES OF AMERICA, *Petitioner*

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The oral opinion of the District Court (R. 11) is not reported. The opinion of the Court of Appeals (R. 14) is reported at 182 F. 2d 332.

JURISDICTION

The judgment of the court below was entered on May 17, 1950 (R. 18). Petitions for rehearing were denied on July 17, 1950 (R. 30). The petition for certiorari was filed on October 5, 1950 and

granted on November 27, 1950 (R. 30). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTION PRESENTED

Whether the judicial authority contained in Section 206(b) of the Housing and Rent Act of 1947, as amended, to issue an "order enforcing compliance" with any provision of that Act or order issued thereunder, empowers a court to order a landlord to make restitution of overceiling rentals received by him in a defense-rental area which was decontrolled after the occurrence of the violations but prior to the filing of the suit against the landlord.

STATUTE INVOLVED

Sections 206(a) and (b) of the Housing and Rent Act of 1947 as amended (61 Stat. 193; 62 Stat. 93; 63 Stat. 18; 50 U.S.C. App. (Supp. III) 1891 *et seq.*) read as follows:

> SEC. 206(a) It shall be unlawful for any person to demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

STATEMENT

Respondents, Warren V. Moore and Mrs. Warren V. Moore are landlords of housing accommodations in Dallas, Texas. Between October 1, 1947, and May 31, 1949, they demanded and received rents in excess of those permitted by the applicable maximum rent regulation[1] issued under the Housing and Rent Act of 1947, as amended (hereinafter referred to as "the Act"). Respondents having refused to comply with the Act and regulation, petitioner brought this action against them pursuant to Sections 205 and 206(a) and (b) of the Act for

[1] Controlled Housing Rent Regulation, as amended, 12 F.R. 4331; 13 F.R. 1861; 14 F.R. 1571.

statutory damages, injunctive relief, and for an order of restitution compelling respondents to refund to their tenant the excess of rents collected over the legal maximum. (R. 1.) Prior to the filing of the suit, the Housing Expediter, pursuant to action taken by the City of Dallas under Section 204(j)(3) of the Act,[2] had terminated federal rent controls in that city by amending the Rent Regulation to exclude from its coverage the City of Dallas (14 F. R. 3494). Basing their action on the fact that rental housing in Dallas, Texas, had been decontrolled, respondents moved to dismiss the suit (R. 4). Their motion was denied by the trial court without opinion (R. 6). The suit was thereafter tried and resulted in a judgment directing respon-

[2] Section 204(j)(3), at the time of the decontrol of rental housing in Dallas, Texas, read as follows:

> The Housing Expediter shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable legal law and based upon a finding by such governing body reached as the result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village; *Provided, however,* That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter: *And provided further,* That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area. [63 Stat. 21; 50 U.S.C. App. (Supp. III) 1894(j)(3).]

dents to make restitution to the tenant, J. R. Qualls, in the amount of $1,093.48, and because of "some evidence * * * of wilfulness" (R. 12) the court further directed petitioners to pay to the United States statutory damages in the amount of $50.00 (R. 6-7). Respondents appealed from this judgment (R. 7).

The Court of Appeals reversed the judgment of the trial court and remanded the cause with directions to dismiss the suit in so far as it sought a prohibitory injunction and restitution of overceiling rentals (R. 18).[3] The Court of Appeals rested its decision on the theory that restitution of overceiling rentals is merely ancillary or adjunctive to injunctive relief and cannot be ordered in the absence of power to grant an injunction. Consequently, it held that since the Housing Expediter had been "shorn of all power to enforce * * * control in the future" in Dallas, Texas, by the termination of rent control in that city, the trial court was without authority in this case to grant an injunction against future violations of the Act and hence without power to order restitution of the illegal rentals (R. 14-18).

[3] The petition for certiorari filed herein is directed solely to the ruling of the court below on respondent's appeal with respect to the order for restitution. Petitioner filed a cross-appeal from that part of the trial court's judgment which gave statutory damages for less than the amount of the established overcharges. The ruling of the court below on the cross-appeal, 182 F. 2d 336, is not challenged here.

SUMMARY OF ARGUMENT

I

In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, this Court construed a statutory provision almost identical with that under which the present action was brought to authorize an order of restitution of rental overcharges to the injured tenant. It held that such an order was proper on *either* of two theories, (1) it might be "considered as an equitable adjunct to an injunction degree" (p. 399) or (2) it might be "considered as an order appropriate and necessary to enforce compliance with the Act" (p. 400). By its reference to the second of these theories, the Court plainly intended to hold that restitution could be obtained independently of whether a prohibitory injunction was also appropriate. With the exception of the decision below, the Courts of Appeals have uniformly so construed this Court's holding.

The court below rested its decision denying restitution on the ground that at common law restitution could not be recovered in an independent action but was ancillary to some other proceeding. Here no cause of action for prohibitory injunction existed because the area in question had been decontrolled prior to the institution of the suit. Consequently, there was, in the court's view, no occasion for the exercise of equity jurisdiction. This rationale appears inconsistent with the court's own decisions in other cases and is dubious as a matter

of common law. More important, it ignores the fact that "the powers invoked were not precisely the ordinary equity powers, but those established by * * * the Act", *Creedon* v. *Randolph*, 165 F. 2d 918, 919 (C.A. 5). In fashioning remedies to effectuate a statutory policy, courts are invested with a high degree of flexibility to adapt their orders to particular situations. Nothing in the statutory policy suggests any reason why the availability of the remedy of restitution should be dependent on whether a prohibitory injunction is appropriate in the same case. Restitution was held available because "the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums." *Porter* v. *Warner Holding Co., supra*, at 400. To the effectuation of that purpose, it is irrelevant whether the situation is one in which there is need to enforce future compliance by a prohibitory injunction.

II

Nothing in the decontrol of the applicable area renders the remedy of restitution unavailable to redress violations of the Act which occurred at a time when that area was subject to control. Section 204(f) of the Act, and the General Saving Clause (1 U.S.C. Section 109, 61 Stat. 633), expressly preserve, after termination of the statute, the right to redress past violations. The policy

embodied in those provisions has been applied to cases of revocation or termination of a regulation. No reason appears in the statute or its legislative history for a refusal to apply this policy to violations occurring in areas which were subsequently decontrolled.

ARGUMENT

I. Section 206(b) of the Housing and Rent Act of 1947 empowers the court, on suit by the United States, to award restitution to a tenant of any excessive rentals charged, regardless of whether a prohibitory injunction is sought or awarded.

Section 206(b) of the Housing and Rent Act of 1947 authorizes the United States to apply to any court for an injunction or for "an order enforcing compliance with" any provision of the Act, or any regulation or order issued thereunder, and empowers the court to issue an injunction or "other order." In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, this Court considered Section 205(a) of the Emergency Price Control Act of 1942—a provision which, for all purposes here material, was worded identically with Section 206(b) of the present Act. In that case the Administrator had sought both an injunction restraining future violations and restitution to the appropriate tenants of excessive rents collected. This Court held that an order of restitution was a proper "other order" under that section "on *either* of two theories," (1) it might be "considered as an equitable adjunct to

an injunction decree" (p. 399), or (2) it might be "considered as an order appropriate and necessary to enforce compliance with the Act." (p. 400)[4]

With respect to the second of these theories, the Court pointed out that "Section 205(a) anticipates orders [to enforce compliance with the Act], although it makes no attempt to catalogue the infinite forms and variations which such orders might take," and said that "the problem of formulating these orders has been left to the judicial proces of adapting appropriate remedies to specific situations" (p. 400). It added:

> * * * In framing such remedies under § 205(a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. *Clark* v. *Smith*, 13 Pet. 195, 203. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to

[4] It has also been suggested that an order of restitution may be regarded as a "mandatory injunction" and hence within the statutory authority to issue injunctions. *Creedon* v. *Randolph*, 165 F. 2d 918, 919 (C. A. 5).

> its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains; and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums. [p. 400]

Thus, under the Court's second theory, it is clear that restitution may be awarded as "appropriate and necessary to enforce compliance with the Act and to give effect to its purposes" regardless of whether a prohibitory injunction is sought or obtained. This Court's reference to the second theory would have been both meaningless and misleading if restitution had been deemed permissible only when ancillary to the grant of a prohibitory injunction. In this connection, it is significant that in *Bowles* v. *Skaggs*, 151 F. 2d 817, which this Court cited with approval (328 U.S. at 402) and for conflict with which the petition had been granted in the *Warner Holding Co.* case (328 U.S. at 397), the Sixth Circuit had held that restitution could be awarded although no prohibitory injunction had been sought, and indeed none would have been appropriate since the violation was an isolated act.[5]

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[5] The provisions which had been before this Court in *Warner Holding Co.* (decided June 3, 1946) were incorporated without material change in the 1947 Act and were continued in

With the exception of the present case, the decisions of the various courts of appeals have been unanimous in upholding the power to award restitution, under Section 205(a) of the 1942 Act or Section 206(b) of the 1947 Act, regardless of whether a prohibitory injunction was or could be issued. They have done so in cases in which an injunction was inappropriate because there was no likelihood of future violation, *Bowles* v. *Skaggs, supra; Creedon* v. *Randolph,* 165 F. 2d 918 (C.A. 5), and in cases in which an injunction could not issue because the Act had expired or controls had been removed. *Woods* v. *Wolfe,* 182 F. 2d 516 (C.A. 3); *Woods* v. *Wayne,* 177 F. 2d 559 (C.A. 4); *Jackson* v. *Woods,* 182 F. 2d 338 (C.A. 5); *Miller* v. *United States,* No. 13,283 (C.A. 5, January 10, 1951); *Brooks* v. *Woods,* No. 9589 (C.A. 7,

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force through the extensive revision and reexamination of the Act made in 1948, 1949 and 1950. Indeed in connection with the 1948 amendments the availability of the restitution remedy was clearly recognized. The Senate Report (No. 896, 80th Cong. 2d Sess.) recommends extension of "the power granted by existing law to apply for injunctions or compliance orders" (p. 3). And on the Senate floor Senator Cain, chairman of the subcommittee which had had the bill under consideration pointed out that "the usual order received upon a successful petition for an injunction merely required the landlord to repay to the tenant the overcharge of rent made by the landlord." 94 Cong. Rec. 1602. In such circumstances legislative approval of this Court's decision is to be presumed. *National Labor Relations Board* v. *Gullett Gin Co.,* No. 122, 1950 Term, p. 5 and cases cited.

order of affirmance entered October 13, 1948, not reported); *Ebeling* v. *Woods*, 175 F. 2d 242 (C.A. 8); *Woods* v. *Richman*, 174 F. 2d 614 (C.A. 9); *Woods* v. *Gochnour*, 177 F. 2d 964 (C.A. 9); *Emery* v. *United States*, No. 12,522 (C.A. 9), January 22, 1951; see also *Woods* v. *Davis*, No. 12,626 (C.A. 9, November 28, 1950).[6]

The decision below appears at least to question, if not to repudiate, all of these decisions. The court seems to have rested its holding that restitution is unavailable on the premise that restitution is not "in and of itself a cause of action, of which equity has jurisdiction," but merely "a type of *relief* afforded as an incident to suits at law as well as in equity." "In other words, restitution is ancillary, auxiliary, incidental, or adjunctive to a cause of action of which equity has jurisdiction" (R. 15). From this premise the court concluded that since there was no longer "a right to an injunction to prevent violations and enforce control in an area that had lawfully been decontrolled," "there remained no proceeding of which equity would have jurisdiction to which restitution could be adjunctive." (R. 17)

The court's reasoning in the case below would appear to be inconsistent with its own prior, con-

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[6] Similarly, restitution has been granted under the identically worded provision of section 7 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 211, 50 U. S. C. App. 1827, after that Act had expired. E.g., *United States* v. *Carter*, 171 F. 2d 530 (C. A. 5); *Keele* v. *United States*, 178 F. 2d 766 (C. A. 5).

temporaneous and subsequent decisions. Thus, in *Creedon* v. *Randolph, supra,* decided before the decision below, the court pointed out that the Administrator "did not ask for a prohibitory injunction against future violations, and probably would not have gotten it if he had" (p. 919). For that reason, the District Court had denied restitution on the ground that "here no equitable relief is sought * * *. There is therefore no legal basis for this court to exercise the traditional equity powers and in so doing order restitution." The Court of Appeals, reversing the lower court's decision, pointed out that "the powers invoked were not precisely the ordinary equity powers, but those established by Section 205(a) of the Act," and that accordingly, restitution could be allowed as appropriate to enforce compliance. (*Ibid.*) In *Jackson* v. *Woods, supra,* decided on the same day as the decision below, and *Miller* v. *United States, supra,* decided subsequently, the court similarly allowed restitution where, although a prohibitory injunction was originally sought, none could have been granted because the area had been decontrolled by the time of entry of judgment.[7]

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[7] With reference to the assertion of inconsistency in its decisions the court said in *Miller* v. *United States,*

> By the argument of the parties in this Court, two cases heretofore decided by this Court upon the power to direct restitution of rental overcharges are brought to the forefront as controlling. There is no dispute that the decision in *Jackson* v. *Woods,* 182 F. 2d 328, deals with the

In addition to this apparent inconsistency with other decisions of the same court, the court's rationale is dubious even as an exposition of common

precise factual situation here involved. However, the appellants confidently rely upon the decision of this Court in *Moore* v. *United States*, 182 F. 2d 332. Both of these opinions were published on May 17, 1950, and both were determined by the same division of this Court. Consideration of these two cases shows that the only factual difference in them is that the complaint in the *Jackson* case was filed, as was the one in the present case, prior to the termination of rental control, whereas the complaint in the *Moore* case was filed after rent control had terminated. The Government contends that in any event, because of identity of the factual situation, the *Jackson* case is controlling and that the trial court properly relied upon its authority, but nevertheless contends that the *Moore* decision is not sound and should be reconsidered. The appellants by their reliance upon the *Moore* case, and thus that the *Jackson* case should not be controlling, in effect agree with the Government's contention that the time of the institution of the suit is not legally determinative of the power of the Court to direct restitution. Upon the argument of this case it was made to appear that the Supreme Court had theretofore granted a writ of certiorari to bring the *Moore* decision before it for review. In these circumstances, and since the present case falls squarely within the decision in the *Jackson* case, *supra*, we will not attempt to reconsider the decision in the *Moore* case. There is no necessity to do so at this time. We accede neither to the request of the Government to reconsider the *Moore* case, or of the appellants to apply its principles in the present case. We here apply to the identical situation the ruling announced in the *Jackson* case, *supra*. It follows therefrom that we affirm the judgment of the trial court ordering restitution to be made, even though entered after the termination of rent control.

law, in which an independent action for restitutionary relief was by no means unknown.[8] More important, however, it ignores the fact that in fashioning remedies to effectuate a statutory policy the courts are not limited by the ancient and largely outmoded distinctions between law and equity. The jurisdiction of the court rests on the statutory provision empowering the United States to bring a proceeding to enforce compliance with the Act, and the authority of the court to award restitution rests also on the statutory grant of authority to enter such "other order" as it deems appropriate. See *Creedon* v. *Randolph*, *supra*. Thus, whenever the remedy of restitution is appropriate to enforce compliance, the statute confers jurisdiction to award it.[9]

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[8] E.g., action at law on the common counts to recover money paid under mistake or duress, action at law for replevin, action at equity to impress money or property with a constructive trust. See generally Restatement of Restitution, Introductory Note, pp. 4-10; Sections 4 and 5, pp. 17-23.

[9] For other examples of statutory remedies in the nature of restitution, see:

(1) Actions under Section 2(a)(6) of the Second War Powers Act, as amended, 56 Stat. 177, 50 U.S.C. App. 633. That section's grant of jurisdiction "of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection . . ." has been held to authorize an independent suit by a purchaser for restitution of overpayments in violation of a priorities regulation. *Heinecke* v. *Parr*, 168 F. 2d 194 (C.A. 6); *Keele* v. *Holt*, 171 F. 2d 486 (C.A. 5).

(2) Orders under Section 10(e) of the National Labor Relations Act, 61 Stat. 147, 29 U.S.C. (Supp. III) 160(e). Al-

While this Court, in *Warner Holding Co.*, emphasized that the courts had available to them the full arsenal of remedies which had been created by courts of equity, nothing in its decision suggests

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though the Act authorizes the Board to direct "reinstatement of employees with or without back pay," back pay has been awarded in situations in which reinstatement is either impossible or inappropriate, e.g., *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233 (C.A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Atlantic Towing Co.*, 179 F. 2d 497 (C.A. 5), opinion amended in other respects, 180 F. 2d 726, rehearing denied, 182 F. 2d 625. Reinstatement and back pay have also been awarded to persons assumed to be no longer treated as employees under the Act (see *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 575 (C.A. 6), certiorari denied, 335 U.S. 908; *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 136-137 (C.A. 4); *National Labor Relations Board* v. *Universal Camera Corp.*, 179 F. 2d 749 (C.A. 2), certiorari granted, 339 U.S. 962, No. 40, 1950 Term.

Similarly the Board, under its general power to enter orders which "will effectuate the policies of the Act," has ordered reimbursement of checked-off dues. In sustaining such an order, this Court emphasized that it is "wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order." *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 543.

(3) Actions under Section 2 of the Walsh-Healy Act, 49 Stat. 2037, 41 U.S.C. 36, to require payment, into a fund available for employees, of the amount of "any deductions, rebates, refunds, or underpayment of wages."

(4) Actions under the Fair Labor Standards Act, in which authority to award restitution has been implied from the grant of jurisdiction to enjoin violations. E.g., *Walling* v. *O'Grady*, 146 F. 2d 422 (C.A. 2); *McComb* v. *Frank Scerbo & Sons*, 177 F. 2d 137 (C.A. 2); cf. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193. But see the 1949 amendments,

that the statutory jurisdiction to enter orders appropriate to enforce compliance with the Act is limited to cases which would, apart from statute, have been within the jurisdiction of a court of equity.[10] This Court has often emphasized the flexibility with which a district court, in the effectuation of a statutory policy, should adapt its remedy to the needs of the situation before it. E.g., *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 726; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189; cf., *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. And in other situations courts have not hesitated, in the implementation of statutory rights, to entertain proceedings for which there was no direct non-statutory precedent.[11]

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63 Stat. 919, 29 U.S.C. (Supp. III) 217, withdrawing jurisdiction to issue such restitution orders.

(5) Actions for reparations under the Interstate Commerce Act, 49 U.S.C. 9; the Communications Act, 47 U.S.C. 206, 209, 407; the Packers and Stockyards Act, 7 U.S.C. 209; the Shipping Act, 46 U.S.C. 821, 829, and the Water Carriers Act, 49 U.S.C. (Supp. III) 908.

[10] Compare: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Yakus* v. *United States*, 321 U.S. 414, 441, quoting *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, 552.

[11] See, for example, proceedings under Section 17 of the Trading with the Enemy Act, 40 Stat. 425, 50 U.S.C. App. 17 (conferring jurisdiction on the courts to make such orders and decrees "as may be necessary and proper * * * to enforce

We can perceive no reason for holding that the availability of the remedy of restitution should, as a matter of statutory policy, depend on whether injunctive relief is appropriate in the same case. Restitution at the suit of the United States is available in addition to a suit for damages by the injured party because "the Administrator acts in the public interest—the purchaser in his own. . . . There are undoubtedly many instances where the relationship of buyer and seller is such that the buyer is deterred from vindicating his own and therefore also the public right." *Bowles* v. *Skaggs*, *supra*, at 821. Indeed, this is particularly so in areas where the continuing landlord-tenant relationship is no longer subject to the Act's controls. Nor is restitution concerned solely, as the court below thought, with insuring future compliance. While this Court in the *Warner Holding Co.* case indicated that that was one respect in which a resti-

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the provisions of this Act"). Among the types of proceedings entertained under that section are actions to require the summary transfer to the Alien Property Custodian of specific property, e.g., *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, or of the amount of a debt, e.g., *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241, or to require summary issuance to him of new certificates of stock, cf. *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, subject to later plenary adjudication of his rights in another proceeding. Similarly, state probate and other courts which would otherwise have plenary jurisdiction over property, have, on demand by the Custodian, ordered it summarily turned over to him. *Matter of Daly*, 189 Misc. 680, 74 N.Y. Supp. 2d 711; *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y. Supp. 2d 289.

tution order would give effect to the Act's purposes, it also pointed out that "the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums" (328 U.S., at 400). To the effectuation of that purpose, it is irrelevant whether the situation is one in which there is a need to enforce future compliance. It is sufficient that there have been overcharges in the past which may, by an order of restitution, be "reduced to their legal maximums."

II. The remedy of restitution is available notwithstanding the fact that the Dallas area has been decontrolled.

As we have seen, restitution is an independent statutory remedy which is available regardless of whether other remedies, such as a prohibitory injunction, are requested or appropriate. Consequently, nothing in the fact that the Dallas, Texas, area has been decontrolled renders that remedy inapplicable to redress violations of the Act which occurred at a time when the area was subject to control. This result is made clear by the saving provision of Section 204(f) of the Act (50 U.S.C. App., Supp. III, 1894(f)), which provides that after termination of the Act, all of its provisions, and all regulations and orders issued thereunder, are maintained in full force and effect "for the purpose of sustaining any proper suit or action with respect to any right or liability incurred

prior to the termination date." [12] Like the similar provision of Section 1(b) of the Emergency Price Control Act of 1942, this provision is clearly applicable "whether or not suit is started prior to the termination date of the Act." *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 119; see also, *Woods* v. *Hills*, 334 U.S. 210. The same result is achieved by the General Saving Clause, 1 U.S.C. §109, 61 Stat. 635,[13] which is incorporated into every subsequent statute unless denied application by the terms or clear implication of that statute. *Great Northern Ry Co.* v. *United States*, 208 U.S. 452, 465; *Hertz* v. *Woodman*, 218 U.S. 205, 217; *National Labor Relations Board* v. *National Garment Co.*, 166 F.

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[12] Section 204(f) was amended by the Act of June 23, 1950, P. L. 574, 81st Cong., 2d sess., in minor respects, and renumbered as Section 204(f)(4), which now provides as follows:

> (4) Notwithstanding any provision of paragraph (1) or (3) of this subsection, the provisions of this title and regulations, orders, and requirements thereunder shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any right or liability incurred prior to the termination date specified in such paragraph.

Paragraphs (1) and (3) of subsection (f) provide, respectively, that the provisions of the Act shall cease to be in effect at the close of December 31, 1950 (with exceptions not here material), or upon the date of a presidential proclamation or concurrent resolution of both houses of Congress. By the Act of June 23, 1950, Public Law 574, 81st Cong., 2d Sess., the Act was extended to June 30, 1951.

[13] "§ 109. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still

2d 233, 237 (C.A. 8), certiorari denied, 334 U.S. 845; *United States* v. *Carter*, 171 F. 2d 530, 532 (C.A. 5); *United States* v. *McNair*, 180 F. 2d 273, 274 (C.A. 9).[14]

These provisions reflect a deliberate legislative rejection of the common law presumption that repeal of a statute is intended as a legislative pardon for past actions (see *United States* v. *Hark*, 49 F. Supp. 95, 97 (D. Mass.), reversed, 320 U.S. 531). The policy which they embody applies equally to cases of revocation or termination of a regulation. *United States* v. *Hark*, 320 U.S. 531; *Utah Junk Co.* v. *Porter*, 328 U.S. 39.[15] No reason appears in the statute or its legislative history for a refusal to apply this policy to violations occurring in areas which were subsequently decontrolled. Indeed, since the statute and its underlying policy remain

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remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[14] This is so notwithstanding the inclusion in the statute of a specific saving clause. *Great Northern Ry. Co.* v. *United States*, *supra*.

[15] See also, *United States* v. *Cream Products Distributing Co.*, 156 F. 2d 732 (C.A. 7); *Fredrick* v. *United States*, 163 F. 2d 536, 543 (C.A. 9), certiorari denied, 332 U.S. 775; *Crary* v. *Porter*, 157 F. 2d 410 (C.A. 8); *Rodgers* v. *United States*, 158 F. 2d 835 (C.A. 6).

in general effect, notwithstanding decontrol in particular areas, it would seem to follow, *a fortiori*, that violations occurring in such areas prior to decontrol should continue to be remedied.[16]

As this Court indicated in a criminal case, the policy underlying such saving clauses is that if past violations are left unpunished, the Act "would lose, as a practical matter, some of its sanctions. Violations could occur with impunity months before its expiry, for in practice there frequently is an unavoidably substantial lag between violation and prosecution." (*United States* v. *Powers*, 307 U.S. 214, 217.) These principles apply equally to the civil remedies contemplated by the Act. To deny the availability of those remedies in areas which were decontrolled after the violation occurred would discriminate in favor of those landlords who succeeded, for a time, in keeping their violations undetected, and would, to the extent that the excessive rentals are not restored to the tenant, promote rather than prevent inflation during the period of control.

Respondents contend that the saving clause is inapplicable here because the provision of Section 204(j)(3) that "the Housing Expediter shall terminate the provisions of this title," pursuant to which decontrol was here made, necessarily termi-

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[16] Compare *Fleming* v. *Mohawk Co.*, *supra*, at 119: "Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out."

nated the savings clause itself. The argument was not accepted by the court below for, in this very action, it awarded statutory damages (R. 17-18).[17] In any event, the argument is without merit. The Housing Expediter, in terminating controls in a city pursuant to action taken for the purpose by a local governing body, does not repeal the statute.[18] Only Congress may repeal an Act. The Expediter's action is, in both form and effect, an amendment of his regulation so as to delete the name of the city from the schedule of cities covered by the regulation (14 F. R. 3494). It is thus precisely comparable to the amendment or revocation of a regulation involved in such cases as *United States* v. *Hark, supra.* Moreover, the argument ig-

[17] The Fifth Circuit would also apply the saving clause to permit restitution actions in decontrolled areas where the suit was brought prior to the decontrol. See *Jackson* v. *Woods*, and *Miller* v. *United States*, both cited *supra*, p. 13. Any distinction between cases in which the suit was brought prior to and subsequent to the decontrol is clearly contrary to this Court's statement in *Fleming* v. *Mohawk Co.*, *supra*, that the saving clause applies "whether or not suit is started prior to the termination date of the Act" (331 U.S. at 119).

[18] Respondents suggest that the phrase "Housing Expediter shall terminate" in Section 204(j)(3) is significantly different for present purposes from the provisions of Section 204(j)(1) and (2) which, in the case of decontrol of entire states, merely call upon the Expediter to make an announcement of the decision of the state. This suggestion is without merit in either logic or legislative history. The difference in language would appear to be attributable to a desire that, in the case of decontrol of municipalities, the Expediter should exercise a more affirmative authority than in the case of decontrol of states.

nores the effect of the General Saving Clause, which would remain applicable here regardless of any termination of the provisions of this Act. (See p. 20, *supra.*)

CONCLUSION

To allow the decision below to stand would thwart effective compliance with the Act and impede the statutory policy of preventing inflation. It would constitute an invitation to landlords whose violation was innocent to defer voluntary compliance when overcharges are brought to their attention, in the hope that the areas in which their property is situated will be decontrolled before action is instituted by the Expediter for restitution. It would likewise reward wilful violators and place a premium upon their astuteness in concealing violation until decontrol has taken place.[19]

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[19] Decontrol actions for the nation effective to and including September 8, 1950, undertaken by the various methods provided by the Act are set forth below:

Cumulative April 1, 1949, to September 8, 1950	Actions	Estimated Units	1940 Population
Expediter Initiative	554	1,351,901	15,822,865
Local Option	330	1,317,746	6,650,411
Local Option (County)	1	3,188	47,565
State Option	10	3,489,368	19,876,818
Board Recommendation	6	84,419	559,842
Total	901	6,246,622	42,957,501

Presumably the ruling of the court below would govern in the Fifth Circuit regardless of the manner in which the decontrol of a defense-rental area has been brought about.

Clearly, compliance is not achieved if the violator is permitted to reap the benefits of his wrongdoing, whether it be in controlled or decontrolled areas. Neither the words of the Act, precedent, nor sound reason support the conclusion reached by the court below. Accordingly, the judgment below should be reversed with instructions to reinstate the judgment of the District Court awarding restitution of rental overcharges.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 344

UNITED STATES OF AMERICA, *Petitioner*

VS.

WARREN V. MOORE AND MRS. WARREN V. MOORE,
Respondents

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

STATEMENT

The statement of the petitioner correctly and succinctly states the questions endeavored to be presented by the petition for the writ, except in the conclusion that the Court of Appeals, rested its decision on the theory that restitution of over ceiling rentals can not be granted in the absence of power to grant an injunction. The respondents submit that the decision of the Court of Appeals was and is to the effect that decontrol under Section 204(J) (3) of the Housing and Rent Act of 1947, there survived only a legal

action for damages, and that the one year statute of limitations in Section 205 of the Act[1] was applicable.

While not agreeing with the Court of Appeals that any cause of action not then pending survived decontrol in Dallas, the respondents submit that the propositions herein stated, demonstrate the correctness of the conclusion of the Court of Appeals, that at most, there was saved only the legal action which was governed by the one year statute of limitation.

PROPOSITIONS

FIRST PROPOSITION: The judicial authority contained in Section 206(B). Housing and Rent Act of 1947, to enforce the provisions of said Act, by order of restitution or other order, is dependent upon the right to invoke the jurisdiction of the Court under such section, and, such equitable jurisdiction does not survive the termination of controls under the provisions of Section 204(J) (3) of the Act.

SECOND PROPOSITION: If any action is saved to the United States after decontrol under the provisions of Section 204(J) (3) of the Housing and Rent Act of 1947, it is the pure legal remedy under Section 205(A) of the Act, AND SUCH AN ACTION INSTITUTED AFTER

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1 USCA, Title 50, War & National Defense Appendix, Section 1895.

THE EFFECTIVE DATE OF DECONTROL INVOKES NO EQUITABLE JURISDICTION OF THE COURT.

ARGUMENT

The decision of the Court of Appeals in this case is one of first impression, Dallas being one of the first, if not the first, major City in the United States to terminate Federal Rent controls under Section 204(J) (3) of the Act. This was accomplished on June 23, 1949. (F. R. 3494). This Action was thereafter filed on June 29, 1949 (R. p 1).

The Court of Appeals in its opinion, clearly and definitely held in accordance with the reasoning of this Court in Porter vs. Warner Holding Company, 328 U. S. 395, and not in conflict therewith, as is contended by the petitioner. In the Warner case, this Court was passing upon the Emergency Price Control Act of 1942, the language of which is substantially the same as that of Section 206(B) of the Housing and Rent Act of 1947, but in which case, there existed at the time of the filing of the action, a right in equity and the Court's equitable jurisdiction had attached. Justice Murphy, after reviewing the facts and reaching this conclusion, speaking for this Court, said: "Thus the Administrator invoked the jurisdiction of the District Court to enjoin Acts and practices made illegal by the Act, and to enforce compliance with the Act. Such jurisdiction is an equitable one. Unless otherwise pro-

vided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."

There is nothing in the holding of this Court in Porter vs. Warner Holding Company, supra, that warrants the conclusion of the respondents that restitution in itself is a cause of action, but to the contrary, this Court definitely held in that case that the equity jurisdiction of the District Court had first to be invoked under the appropriate equitable section of the Act, in that case Section 205(A) of the Price Control Act of 1942, and in this case, Section 206(B) of the Housing and Rent Control Act of 1947.

The facts in this case clearly distinguishes it from all of the cited cases, and the Court of Appeals correctly held: "But in the present case, there is no right of action surviving for an injunction, and no other equitable action to which restitution could be an adjunct, with the result that under the legal action, that survived decontrol, the statute of limitations of one year is in full force and effect." (R. p. 27) This holding would be imminently correct even if it be conceded that the Court had the right to order restitution as an adjunct of its legal jurisdiction. For restitution not being in itself a right of action, the one year statute of limitations would nevertheless be applicable.

In none of the cases cited by the petitioner, was the action instituted after the right to invoke the equitable power of the Court had been terminated as in this case. In Jack-

son vs. Woods, 182 F. 2nd, 338, while decided after decontrol in Dallas, the Court of Appeals for the Fifth Circuit, correctly held that having been filed on February 11, 1949, prior to decontrol, that the order of restitution in that case was correct. In the cases of Woods vs. Wayne, 177 F. 2nd, 559; Woods vs. Richmond, 174 F. 2nd, 614; Eberling vs. Woods, 175 F. 2nd, 242; and Woods vs. Wolfe, 182, F. 2nd, 516, the facts justified the holding that jurisdiction of the District Court attached under the equitable provisions of either section 205(A) of the Emergency Price Control Act of 1942, and/or Section 206(B) of the Housing and Rent Act of 1947, and there is no conflict in the holding of the Court of Appeals in this case, with any of those holdings, nor is there any conflict in its own previous holding in the case of Creedon vs. Randolph, 165 F. 2nd, 918. In the Creedon case, the Court of Appeals for the Fifth Circuit decided that case while the Emergency Price Control Act of 1942 was in full force and effect, and merely held that the equitable powers of the Court under Section 205(A) of that Act had been properly invoked, because the complaint sought an "or other order" as provided in such section, because: "That to require restitution of overcharges tends to enforce the law prohibiting them, no one will deny."

The petitioner in this case is in no position to complain or seek a review in this Court, where the judgment of the Court below is more favorable to it than it should have been, and under the well established policy of this Court, a

judgment will not be disturbed where the judgment of the Court below is either a proper one or is one more favorable to the petitioner than it should have been.

It is submitted that such is true in this case, the Court of Appeals held that the Trial Court properly denied respondent's motion to dismiss the entire action because of the savings clause of the Emergency Price Control Act of 1942 (50 USCA Section 201), or the general savings clause (1 USCA, Section 109), as construed by that Court in United States vs. Carter, 171 F. 2nd, 530 (R. p. 24). The petitioner contends in its petition that the savings clause in Section 204(F) of the Housing and Rent Act of 1947 (50 USCA Appendix 1894F)[2], is plainly broad enough to cover liabilities which arose prior to decontrol, even where suit is not brought until after the decontrol takes place. This same section is evidently the one that the Court of Appeals intended to cite, rather than the savings clause of the Emergency Price Control Act of 1942, for such Act had expired long prior to the date of the alleged violation and of course could have no application. The respondents take sharp issue with the petitioner that

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2 The provisions of this title (Sections 1891-1899 of this Appendix) shall cease to be in effect at the close of June 30, 1950, or upon the date of a proclamation by the President or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this title (said sections) is not necessary because of the existence of an emergency, which ever date is the earlier; except that as to rights or liabilities incurred prior to such termination date, the provisions of this title (said sections) and regulations, orders, and requirements thereunder shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any such right or liability.

the cited section of the Act is broad enough to cover this liability, for that, such section itself had been terminated prior to the filing of the action, such is the plain provisions of Section 204(J) (3) of the Act.[3]

The savings clause relied upon to sustain the action having died with decontrol in Dallas, it can afford no comfort to the petitioner in this case, nor can the general savings clause, (1 USCA Section 209) under the facts in this case, sustain the Court of Appeals in affirming the action of the Trial Court refusing to dismiss the entire complaint.

The peculiar wording of Section 204(J) (3), was the mature and deliberate act of Congress, and the word "terminate" was used in its usual and customary signification: "to end," "to bring to a close," and the general savings clause has no application to such a situation. That general savings clause only protects those rights and liabilities which might be affected by the inadvertent overlooking by the Congress of some such right or liability in repealing or allowing to expire some statutory provision. Cer-

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3 **The Housing Expediter shall terminate the provisions of this title (Sections 1891-1899 of this Appendix)** in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after ten days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village: **Provided however, That such resolution** is first approved by the Governor of the State before being transmitted to the Housing Expediter: **And provided further,** That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area.

tainly it would be a strained construction to say that such general savings clause saved to the petitioner this cause of action when the Congress had maturely and deliberately said that decontrol of housing accommodations in the City of Dallas, under Section 204 (J) (3), *should terminate the provisions of such Title (the Act) including the savings clause which the Congress had enacted.* If the Congress had intended that actions should survive decontrol under such section, it would have been a simple matter for the joint-conference committee to have so provided. It must be borne in mind that this legislation was passed long after large portions of the country had contended and claimed that the reasons for control had long since expired and to meet such clamor and demand of the population, the Congress inserted Section 204(J) (3) in the Act, and respondents submit it is not an unreasonable assumption that the Congress had in mind protecting property owners against such suits as this, where the cause of action had accrued within the year preceding the decontrol to relieve them from the possible inequity of having had to endure continued controls until such time as the local authorities had taken the then authorized action.

CONCLUSION

In conclusion, it is respectfully submitted that the question presented by the petition for writ of certiorari is purely academic, and that the Court below has either cor-

rectly decided the issue or has decided it more favorably to petitioner than that to which it is entitled, and the writ of certiorari should be refused.

In the alternative that if the importance of the question is sufficient to demand the Court grant the writ, then the entire question as to what survived decontrol, should be reviewed and decided. If as contended by petitioner, the decision will govern many future cases, the opinion of this Court should be sufficiently broad to dispose of respondents' contention that all right to institute an action is completely and finally at an end with decontrol under Section 204(J) (3) of the Housing and Rent Act of 1947.

Respectfully submitted,

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I, Frank Cusack, Counsel for Respondents, Warren V. Moore and Mrs. Warren V. Moore, hereby certify that the petitioner has been served with the within brief by mailing five copies thereof to the Honorable Philip B. Perlman, Solicitor General of the United States by United States mail, deposited in the post office at Dallas, Texas, ad-

dressed to the Honorable Philip B. Perlman, Solicitor General, Washington, D. C., with postage thereon pre-paid.

.....

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No. 344

IN THE

Supreme Court of the United States

October Term, 1950

UNITED STATES OF AMERICA, *Petitioner*

vs.

WARREN V. MOORE AND MRS. WARREN V. MOORE,
Respondents

On Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS

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No. 314

IN THE

Supreme Court of the United States

October Term, 1950

UNITED STATES OF AMERICA, *Petitioner*

VS.

WARREN V. MOORE AND MRS. WARREN V. MOORE,
Respondents

On Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS

STATEMENT

The respondents accept the statement of the petitioner as being substantially correct and as being correct insofar as the chronological date order of the events are concerned.

The respondents challenge the accuracy of the statement that the respondents had refused to comply with the act and regulation, there being no such allegation in the complaint of even a demand for compliance, nor was there any proof of a demand, nor was there any proof offered on the trial that either the expediter or the tenant involved, had made any demand for refund of the alleged overcharge. These matters are probably immaterial to the question under consideration here, yet are on a point which was raised in both the Court below and the Court of Appeals, on the question of whether a maximum legal rental had been validly proven, and as will be herein shown, are available to these respondents in support of the judgment of reversal in the Court of Appeals.

The respondents likewise challenge the accuracy of the legal conclusion, in the statement, that the Court of Appeals rested its decision on the theory that restitution of over ceiling rentals is merely ancillary or adjunctive to injunctive relief. While the Court of Appeals used such language in arriving at the controlling decision of that Court, yet nevertheless, the controlling decision was that the Act having been terminated prior to the filing of this action, that the only relief available to the petitioner was for damages, and that the one year period of limitation as provided in the Act, was applicable.

The respondents will endeavor to answer herein the argument of the petitioner in reverse order, in that the respondents strongly feel that a proper construction of

the effect of decontrol in Dallas, demonstrates that the petitioner received a more favorable decision in the Court of Appeals than that to which it was entitled, as under such proper construction no cause of action survived decontrol.

ARGUMENT

I. THE ONLY RIGHT OF THE UNITED STATES TO MAINTAIN THIS ACTION WAS CONFERRED BY TITLE II OF THE HOUSING & RENT ACT, AND NO CAUSE OF ACTION SURVIVED THE TERMINATION OF SUCH TITLE II OF THE ACT, IN ACCORDANCE WITH THE PROVISIONS OF SECTION 204 (j) (3) THEREOF.

The Act in effect at the time this action was brought, was the Housing & Rent Act of 1949. The respondents' motion to dismiss was based upon the fact that prior to the filing of the complaint in the Trial Court, Title II of said Act (under which the action was brought), had been terminated in accordance with the provisions of Section 204 (j) (3) of such Title. In the alternative the motion to dismiss asked that the complaint, insofar as the same sought damages and or restitution for any period of time accruing more than one year prior to filing of the complaint, be dismissed.

The petitioner in its brief, page 23, concedes that the Housing Expediter in terminating controls in the City of Dallas, did not repeal the statute. It likewise concedes

that only Congress may repeal an Act, and that the Expediter's action is in "both form and effect an amendment". The contention of the Respondents herein, as urged in the Trial Court and the Court of Appeals, and as now urged again in this Court, does no violence to prior decisions of this Court on the construction of statutes of a similar nature.

It was the definite, deliberate Legislative intent that upon decontrol of a City under the provisions of Section 204 (j) (3) of the Act, that Title II thereof be terminated. This is readily apparent from the plain reading of the three modes as provided in such section for the ending of control, even without a reference to the Legislative history of the Act. A reference to the Legislative history shows that this particular provision and the choice of language used, was embodied in a report of a joint committee of the Senate and House, reconciling the difference between the enactments of the respective bodies and was a complete departure from the original provisions of both Houses of Congress. It is likewise significant that the same committee, at the same time, and for the *first* time, inserted a savings clause in Title I of the Act.

Respondents do not feel that it can be argued with any remote possibilities of success, that the termination of Title II of the Act by compliance with the provisions of Section 204 (j) (3) thereof, leaves any possible benefits to the petitioner, by reason of the savings clause contained in the terminated Title. Both the Trial Court and the Court

of Appeals fell back on the General Savings Clause in Title I, and petitioner here urges that its action was saved by such General Savings Clause. The respondents submit that under proper statutory construction, this argument is without merit. The Courts can not by judicial fiat, enlarge upon the plain unambiguous enactments of the Congress.

There is nothing ambiguous about the provisions of the General Savings Clause, 1 USC Section 109. This statute plainly and unequivocally provides that upon the *repeal* of any statute, or upon the *expiration* of a temporary statute, unless the Congress has plainly provided otherwise, such *repealed* or *expired* temporary statute should be treated in full force for the purpose of sustaining actions for the enforcement of penalties, etc.

The petitioner concedes that this statute (the rent act) was not repealed and likewise concedes that it did not expire, and for this Court to hold that Section 109 has the effect of saving any right of action, such as is asserted here, would do violence to all statutory construction, and would in effect be this Court inserting in Section 109, Title I, in addition to the governing words "*repealed*" and "*expired*", the word "amendment." This only the Congress can do.

The Congress having provided for a mode of amendment to the Act, and the Act having been amended in accordance with such provision, which amendment terminated, insofar

as the City of Dallas was concerned, Title II of the Act including the Savings Clause, nothing survived to support this action.

The opinion of the Fifth Circuit in this case is entirely compatible with its decision of the same date in Jackson vs. Woods, 182 Federal 2d, 338, in which case the equitable jurisdiction of the Court had been invoked by the filing of the action prior to decontrol, and as held by this Court in Porter vs. Warner Valley Holding Company, 328 US 395, once the equitable jurisdiction had been *properly* invoked, the Court had jurisdiction for all purposes, and it is likewise distinguishable from the later case of Miller vs. United States, which action was also filed prior to decontrol of the City of San Antonio, and is further distinguishable from the Miller case, in that in the City of San Antonio, decontrol was effected under the provisions of Section 204 (j) (2) of the Act. Regardless of what the Fifth Circuit apparently said the parties contended in that Court in the Miller case, with reference to the importance of the time of filing, that is, whether before or after the effective date of decontrol, the respondents respectfully submit that the time of the institution of the suit is legally determinative of the question of jurisdiction, in that respondents concede that under the Porter vs. Warner Valley Holding Company decision by this Court, that if the equitable jurisdiction of the Court had been invoked prior to the effective date of decontrol and when the United States still had an equitable action, then under such holding, the decontrol did

not deprive the Court of such jurisdiction, but when the equitable action died with decontrol, a suit thereafter filed, could not invoke the equitable jurisdiction of the District Court, and as held by the Fifth Circuit, no jurisdiction attached except one at law for damages. Likewise this case is distinguishable from the Miller case, in that the manner of decontrol in the City of Dallas terminated the provisions of Title II, while the Housing Accommodations involved in the Miller case were decontrolled by State Law that declared Federal Rent control is no longer necessary in the State of Texas, and the pronouncement by the Housing Expediter to that effect under the provisions of said sub-section 204 (j) (2), all that was terminated was rent controls within the State of Texas. This should give further effect to the respondents' contention that the Congress deliberate choice of language brought about the effect of complete termination of Title II as applied to this action. It is likewise significant that the Congress when the Housing & Rent Act was again under consideration in June, 1950, and after the decision by the Fifth Circuit in this case, again had before it the question of saving rights of action accruing for violation of the Housing & Rent Act, and again amended the Saving Clause appearing in Title II thereof, at which time Section 204(f)(4) was amended to provide, that notwithstanding the provisions of paragraph (1) or (3) of this sub-section (f) that right of action was saved, etc. Had the Congress intended to save a right of action to the United States or anyone else after a termina-

tion of the provisions of Title II under Section 204 (j) (3), it could have very easily have said: "notwithstanding the provisions of paragraph (1) or (3) of this sub-section, and notwithstanding the provisions of paragraph (j) (3) of this Title," it did not see fit to do so, and under all rules of statutory construction, it is presumed that Congress acted with full knowledge of the construction that had been placed on this matter by the Fifth Circuit in this case and approved the same.

II. IF ANY RIGHT OF ACTION SURVIVED TO THE UNITED STATES UNDER THE HOUSING & RENT ACT, AFTER THE TERMINATION OF TITLE II UNDER THE PROVISIONS OF SECTION 204 (j) (3) THEREOF, SUCH RIGHT IS LIMITED TO THE LEGAL ACTION UNDER SECTION 205 (a), AND THE ONE YEAR PERIOD OF LIMITATION PROVIDED IN SUCH SECTION APPLIES.

The Fifth Circuit in this case, did nothing more than hold that upon decontrol by the City of Dallas under the provisions of Section 204 (j) (3) of the Act, no cause of action survived to the United States except one at law for damages to the extent barred by the one year statute of limitation. The Court below in its opinion said "It seems clear that any suit at law for damages to the extent not barred by the one year statute of limitation, that had accrued prior to the decontrolling of Dallas, might still be enforced for such damages, notwithstanding the termina-

tion of control." (R. 15) And again in its opinion, the Court said "But in the present case, there is no right of action surviving for an injunction and no other equitable action to which restitution could be an adjunct, with the result that under the *legal action that survives decontrol*, the statute of limitation of one year is in full force and effect". (R. 18) (Italics ours)

The decision of the Fifth Circuit in this case does no violence whatsoever to the holding of this Court in Porter vs. Warner Holding Company, 328 US 395, but rather definitely follows such holding. It makes little if any difference, except for the legal fiction of restitution, whether the judgment be called for restitution or for damages, the amount would nevertheless be limited to that period as provided by statute. This is true because of the fact that at the time of the filing of this suit, the complaint *invoked only the jurisdiction of the District Court in an action at law.*

The respondents are inclined to agree with Justice Waller in his opinion in this case, wherein he states "It (restitution) is now and always has been a type of relief afforded as an incident to suits at law, as well as in equity", and respondents certainly agree with his further statement, which was but applying the holding of this Court in Porter vs. Warner Holding Company supra, where he continued and said "But which equity had no jurisdiction to grant unless it had acquired jurisdiction of a *cause in*

equity involving a primary right under equitable principles."

In none of the cases cited by petitioners has any Court ever held that there was any *equitable power* to award restitution in any case where the equitable jurisdiction of the Court had not attached. The Fifth Circuit in this case, when considering the later case of Miller vs. United States, apparently declined to re-consider its opinion in this case, for the reason that it was so clearly distinguishable from the Miller case, as well as the Jackson case. The petition for writ of certiorari filed by petitioners herein, contends that the decision of the Court below is in conflict with four other Courts of Appeal, as well as its own prior decision in Creedon vs. Randolph, 165 Federal 2d, 918, and in so contending, wholly fails to see the distinction between the case at bar and those cases, which distinction was clearly drawn by the Fifth Circuit, both in its decision of this case, and in later consideration of the Miller case, the factual distinction being that this action was filed after the right to do so as an equitable action had been terminated. This distinction respondents submit is all important and, when the decision in this case is considered in the light of this factual distinction, it is readily apparent that the Fifth Circuit in its opinion in this case, has given full effect to the prior decision of this Court in Porter vs. Warner Holding Company, supra, where this Court said:

"It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property ac-

quired in violation of the Emergency Price Control Act, may properly be entered by a District Court *once its equity jurisdiction has been invoked under* §205."

There is no mistaking the holding of this Court on that matter and clearly holds that before a District Court can exercise its equitable power conferred by §205 (a) of the Emergency Price Control Act of 1942, that the District Court must have acquired an equitable jurisdiction. This was further recognized when the Court in the course of its opinion again said:

> "To be sure such a recovery (restitution) could not be obtained through an independent suit in equity, if an adequate legal remedy were available",

and construing §205 (e) of that Act, which Section for practical purposes is identical with §205 (a) of the Act, under consideration herein, said:

> "§205 (e) supersedes that possibility (that is, the possibility of equitable jurisdiction) and provides an exclusive remedy relative to damages. It establishes the sole means whereby individuals may assert their private right to damages, and whereby the administrator, on behalf of the United States may seek damages in the nature of penalties. Moreover, a Court giving relief under §205 (e) acts as a *Court of law* rather than as a Court of equity."

The holding of the Court of appeals in this case is just that simple, after having determined as a fact that rent control had been terminated in Dallas prior to the filing of this action, it literally applied this Court's holding in the

Warner case, for if any action survived whatsoever, it clearly was an action at law, and §205 (a) of this Act as effectively superseded the equitable action under §206(b) as did §205 (e) of the Price Control Act of 1942.

In the later case of Miller vs.United States by the Fifth Circuit, both the appellant, Miller, and the United States, urged to that Court that it made no legal difference insofar as the time of filing of the complaint was concerned. Respondents can not agree with such position for the reason that it is a matter of jurisdiction. Whether under the Savings Clause, the Court had jurisdiction to render any type of judgment whatsoever, except that of dismissal, in the first instance, and in the second instance as to whether or not after decontrol, it could acquire any equitable jurisdiction. It was this factual distinction that the Court of Appeals relied on.

While not agreeing with the statement of appellant, Miller, in its brief to the effect that there is and should be no distinction between the situation, and that it is not a matter of whether or not the Court had jurisdiction under the Savings Clause, respondents do agree that notwithstanding the factual differences, and notwithstanding the question of jurisdiction raised by respondents, it is also involved as to whether the United States had a right to enforce compliance with the law that in keeping with public policy was no longer in effect. Respondents are also certainly in accord with the position of the appellants in

the Miller case that the United States had an adequate remedy at law, and its entire complaint in the Trial Court, the Court of Appeals and in this Court, is nothing more nor less than a smoke screen to circumvent the period of limitation provided for in the Act. The appellants in the Miller case, as well as the Fifth Circuit, in deciding that case, clearly recognized that the Fifth Circuit had followed the Warner Holding Company case because the appellants in its brief, in that case, made this statement:

> "We feel that under the Warner Holding Company case this Court should carry its reasoning in Moore vs. United States to a logical conclusion and hold that the Trial Court in this cause was not justified in granting an order of restitution where an injunction could not be properly granted, and where compliance with a terminated law could not be compelled."

This statement from appellant's brief in that case, respondents submit, logically sums up the applicable law to this type of situation, whether the suit was filed before or after decontrol, because it can not be seriously argued that a Court would be justified in granting an injunction or other proper order for the enforcement of an act when no violation was being committed, either at the time of the filing of the suit or at the time of the trial, for the simple reason that the controls had ended. Certainly this should be true where the controls had ended, as in this case, prior to the filing of the complaint in the District Court.

Before this Honorable Court should give the far reaching effect to its prior holding in the Warner Holding Company case, supra, sought by the United States we respectfully urge that this Court reconsider the entire matter and give effect to what appears to be the better reasoning in the minority opinion in that case, for certainly it was not intended by this Court, we feel sure, to establish a remedy and provide a penalty which the Congress had not seen fit to grant to the United States.

III. WHERE THE TRIAL COURT HAS ACTED UPON A COMPLAINT AS HAVING INVOKED ITS EQUITY JURISDICTION, THE DEFENDANTS ARE DEPRIVED OF THEIR RIGHT TO A TRIAL BY JURY WHERE THE ONLY ISSUE INVOLVED IS PURELY ONE AT LAW, AND A JUDGMENT OF REVERSAL SHOULD CARRY WITH IT INSTRUCTIONS TO TRY THE MATTER AS AN ACTION AT LAW WITH ALL THE RIGHTS OF THE PARTIES INCIDENT TO SUCH AN ACTION.

In this action, the defendants in the Trial Court, respondents here, have been deprived of their Constitutional right to a trial by jury by this action having been treated as one in equity. This matter was properly raised in the Court of Appeals and this Honorable Court, if for no other reason, should reverse this cause and remand the same to the Trial Court with appropriate instructions.

It is respectfully submitted that under the previous holdings of this Court, that notwithstanding the absence of a cross-petition, this matter is properly presented. Walling vs. General Industries Company, 330 US 545; Public Service Commission of Puerto Rica vs. Havemeyer, 296 US 506; and Storey Parchment Company vs. Patterson P. Paper Company, 282 US 555.

CONCLUSION

In conclusion it is respectfully submitted that the judgment of the Circuit Court should be modified and affirmed and this cause remanded to the Trial Court, with instructions to dismiss the complaint, in the alternative that the judgment of the Court of appeals be affirmed with cause remanded to the Trial Court, with the further instruction to try the remaining issues as an action at law.

Respectfully submitted,

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APPENDIX

After being amended by the Housing and Rent Act of 1949, the appropriate sub-divisions of Section 204, in effect at the time, provides as follows:

204 (f) The provisions of this Title (Section 1891-1899 of this appendix) shall cease to be in effect at the close of June 30, 1950, or upon the date of a proclamation by the President, or upon the date specified in the concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Title (said section), is not necessary because of the existence of an emergency, whichever date is the earlier: Except that as to rights or liabilities incurred prior to such termination date, the provisions of this Title (said sections) and regulations, orders, and requirements thereunder, shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any such liability.

204 (j) (2) provided: If any State by law declares that Federal Rent control is no longer necessary in such State or any part thereof, and notifies the Housing Expediter of that fact, the Housing Expediter shall immediately make announcement to that effect that he has been so advised. At the same time, all rent controls under this Act, as amended (Sections 1881-1910 of this appendix) with respect to housing accommodations within such State or part thereof, shall be terminated on the fifteenth day after

receipt of such advice. As used in this sub-section, the term "State" means any State, territory, or possession of the United States.

204 (j) (3) in effect at the time provided as follows: *The Housing Expediter shall terminate the provisions of this Title* (Sections 1891-1899 of this appendix) in any incorporated City, Town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after ten days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such City, Town or Village: *Provided, however*, that such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter: *and provided further* that where the major portion of a defense rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area.

Sec. 205 Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment, or shall be liable to the United States as hereinafter provided, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50.00, or (2) three times the amount by which the pay-

ment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: Provided, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State or Territorial court of competent jurisdiction within one year after the date of such violation: Provided, that if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of the action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or

received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered.

Sec. 206 (b) in effect at such time provided: Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act (Sections 1881-1810 of this appendix,) ** or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial Court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Sec. 204 (f) of the act was amended by Acts of June 23, 1950, Chapter C354 §3 and §5 by the Congress breaking such section down into four numbered sub-divisions, the first two of which are important to the consideration of this case, and as amended, provide as follows: (f) (1) The provisions of this Title (Section 1891-1902 of this appendix) except Section 204 (a) [Sub-section (a) of this sec-

tion] shall cease to be in effect at the close of December 31, 1950, except that they shall cease to be in effect at the close of June 30, 1951.—* * *

204 (f) (4) Notwithstanding any provisions of paragraphs (1) or (3) of this sub-section, the provisions of this Title (Sections 1891-1902 of this appendix) and regulations, orders and requirements thereunder shall be treated as still remaining in force for the purposes of sustaining any proper suit or action with respect to any right or liability incurred prior to the termination date specified in such paragraph.

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APR 10

No. 344

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*

VS.

WARREN V. MOORE AND MRS. WARREN V. MOORE,
Respondents

RESPONDENTS' MOTION FOR RE-HEARING

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RESPONDENTS' MOTION FOR RE-HEARING

Come now Warren V. Moore and Mrs. Warren V. Moore, respondents in the above entitled and numbered matter, and move the Court to grant them a re-hearing for the following reasons:

1.

The Court in the majority opinion erred in holding that there survived to the petitioner, upon de-control of the City of Dallas, the right under Section 206(b), to enforce the compliance with the Act solely by an order of restitution.

The majority opinion in extending the Warner case to embrace restitution as an action within itself, is contrary to all of the concepts of the law of restitution as evolved throughout legal history. Restitution of and in itself has never been a cause of action, either in equity or at law. It is now, or was until the holding in this case, and always has been incidental in granting relief in equity or in an action at law. It is now and always has been wholly and purely ancillary. It may be, as held by the majority, that the order for restitution entered by the District Court in this action, was permissible under Section 206(b) as "*another order*" ancillary to or adjunctive to the legal action for penalties as provided in Section 205.

To construe Section 206 and enlarge the holding in the Warner case other than as above stated, is stretching even the broad ground of interpretation adopted in the Warner case beyond the realm of interpretation and into the realm of Legislation and the overturning of the great body of the substantive law and of all the concepts of restitution as decided, applied and restated down through the ages to and including the Restatement of the Law of Restitution. Surely the majority did not intend such clear implication to arise out of its holding in this case.

It matters little to the respondents whether the final judgment against them carried the adjunctive relief of restitution, so long as it is adjunctive to or incidental to the only relief which is available to the petitioner in the legal remedy provided in Section 205. If any right sur-

vived at all this Court should go no further than holding that restitution is available as "another order" for the purpose of enforcing the legal action and penalties as provided in Section 205 in the action at law which arises under such section.

2.

The Court in its majority opinion erred in holding that any cause of action survived de-control of the City of Dallas under the provisions of Section 204(j)(3) and wholly overlooks, ignores and fails to give application to the fact that the "sufficient answer" given by this Court as Section 204(f), as set out in the margin, was a part of Title II and terminated and ceased to be effective with de-control. If Title II of the Act was terminated as impliedly held by the majority in its opinion by de-control under Section 204(j)(3), by the same token Section 204(f) ceased to be operative and of no avail to sustain petitioner's action.

The majority in its opinion also clearly failed to give effect, even if we must assume that Section 204(f) was available, that it saved to the petitioner only an action with respect to any right or liability which had theretofore accrued under the Act. There accrued no right to enforce the provisions of the expired act. The rights, if any, that were saved by Section 204(j) were the rights to enforce the penalties of Section 205, and the only liability, if any, surviving against the respondent would be to

respond with the penalty as provided in Section 205. Expired acts are not enforced beyond the penalty imposed for the infraction thereof.

In connection with the holding of the Court of Appeals, certainly respondents did not challenge and are not challenging the decision of that Court on petitioner's cross-appeal as pointed out in footnote five of this Court's opinion. The respondents here concede, as they did in the Court of Appeals, that the liabilities under Section 205 were as held by the Court of Appeals for that period, if any, embraced in a proper complaint which occurred during the period in which Section 205, as amended, was effective. We still concede that that is the law without conceding that there was any period of time available to the petitioner during the effective period of Section 205 as amended. We do not concede that Section 205, as amended, had a retroactive or retrospective effect, and that for any period of time prior to the amendment, it is still discretionary with the Trial Court to award damages or $50.00.

3.

The Court erred in holding that the respondents waived a right to a trial by jury for the reason that that to which one has no right can not be waived. This action as filed and as tried was based upon a complaint wholly equitable and certainly the law and the Federal Rules of Civil Procedure do not require one to do the ridiculous, absurd and foolish, and that is what a demand for a jury would have

been in this action in the state of the pleadings. Respondents submit that Federal Rule of Civil Procedure No. 38 should be construed under the Rule of Reason, rather than as interpreted by the Court in this case. To hold that Rule 38 is inflexible and requires one at his own peril to either do the absurd and ridiculous by demanding a jury to which he is clearly not entitled or to waive the same, brings such Rule clearly in conflict with the Seventh Amendment to the Constitution, and any other Rule which this Court might make which abridges the rights of a party under the Constitution, *upon a timely assertion of such right after it has become available*, must yield to the Constitution.

The respondents in this case timely filed their motion to dismiss the equitable action, which motion we submit was erroneously overruled by the Trial Court and applying the Rule of Reason to Rule 38, respondents would have had ten days in which to demand a jury after the pleadings, (either by amendment by the parties or by an Appellate Court as was done in this case) made it apparent that the right to a trial by a jury was available.

Counsel for respondents here and now certifies that within the time provided by Rule 38, Rules of Civil Procedure, after the return of the mandate from the Court of Appeals in this case to the Trial Court, did timely file and serve respondents written demand for a jury, which has been denied. If necessary, respondents ask that certiorari to the Trial Court issue to bring a supplemental

record forward showing such action. There are many fact questions in this case as to the legal action which survived, if anything survived, on which respondents are entitled to a jury, and of which they have been deprived. Respondents had the right to and did stand in this case on their pleadings which would have had the effect of reforming the action to an action at law and have never had their day in Court, which should be granted and before a jury, as guaranteed by the Constitution.

WHEREFORE, respondents pray that a re-hearing be granted; that the judgment of the Court of Appeals be reversed and the complaint ordered dismissed; or in the alternative the judgment of the Court of Appeals be affirmed with further instructions that the new trial as ordered be in an action at law with a jury.

Respectfully submitted,

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Attorney for Respondents

The foregoing petition for re-hearing is presented in good faith and not for delay.

FRANK CUSACK